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ABSENTEE.

1. No judgment can be rendered against an absentee, where no property of his has been attached, and he has not personally appeared. The appointment of a curator *ad hoc* cannot give jurisdiction. *Augusta Insurance Company* v. *Morton*, 417.

2. A minor, whose father is dead and who resides with his mother in another State, is properly represented by a curator *ad hoc*, in an action in which it is prayed that he may be joined as one of the plaintiffs, when his mother has never been confirmed or sworn as his tutrix, and he is unrepresented here or elsewhere by any tutor or guardian. C. C. 116. Until her confirmation and oath as tutrix, the mother was incapable of representing him. C. C. 328. *Petrie* v. *Wofford*, 562.

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The failure to make an amicable demand is no ground for dismissing the proceedings, and no bar to a recovery; and unless the want of such demand be pleaded *in limine litis*, proof that it was not made is not required. *Dubuch* v. *Wildermuth*, 407.

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I. *Will lie When.*

1. An appeal must be dismissed where the record does not show that the amount in dispute exceeds three hundred dollars. *Spangenberg* v. *Bigelow*, 70.

2. Where a plaintiff who had appealed from a judgment rendered in his favor but for a less amount than he claimed, executing a bond with surety for the costs only, subsequently causes a *fi. fa.* to be issued against the defendant, it will be considered a voluntary execution of the judgment and an abandonment of the appeal. C. P. 567. *Campbell* v. *Orillion*, 115.

3. An appeal must be dismissed, where the judgment from which it was taken was not final, nor such a one as could cause an irreparable injury. *Bailey* v. *Sims*, 217.

4. Where after obtaining an order allowing an appeal, the appellant fails to give bond or surety and abandons his appeal, he cannot afterwards renew it. C. P. 504. *Jenkins* v. *Bonds*, 339.

5. Where a creditor, who had obtained judgment against his debtor in an action commenced by attachment and in which the property was bonded by the latter, after a return of a *fi. fa.* unsatisfied, takes a rule against the surety in the bond to show cause

why he should not be condemned to pay the debt, and appeals from a judgment dismissing his rule, his subsequently issuing an *alias fi. fa.* will not be considered a voluntary execution of the judgment, authorizing the dismissal of the appeal. The judgment from which the appeal was taken is wholly distinct from that rendered in the principal cause, and in which the *fi. fa.* was issued. *Clements* v. *Cassily*, 358.

6. Where a judgment has been rendered without citation, the party agrieved is not restricted to an action of nullity, but may be relieved on appeal. C. P. 608, 609. *First Municipality* v. *Christ Church*, 453.

7. Where an injunction, arresting the sale of property seized under a *fi. fa.* is dissolved on motion as to a portion of the property, but, after a trial on the merits subsequently had, is maintained as to the remainder, the creditor will not, by executing his *fi. fa.* against the portion as to which the injunction was dissolved, deprive himself of the right to appeal from the subsequent decree perpetuating the injunction as to the remaining portion. *Mitchell* v. *Lay*, 593.

8. The jurisdiction of the Supreme Court as to fines under $300 in amount, imposed by municipal corporations, is limited to cases in which the constitutionality or legality of the fine is contested. *Ex parte Travers*, 693.

9. Where a judgment rendered in favor of the defendants, in an action to set aside an adjudication made at a sheriff's sale, and dissolving an injunction restraining the sheriff from putting the purchaser in possession, is affirmed on appeal; and the purchaser afterwards, before taking out a writ of possession, takes a rule on a third person, who is alleged to detain the property unlawfully, to show cause why a writ of possession should not issue, and the rule is made absolute on the failure to answer, the defendant in the rule cannot be relieved by appealing from a judgment refusing him a re-hearing of the rule, which was asked for on the ground of the pendency of an action between himself and the purchaser for the property. There can be no objection to the issuing of the writ; but if it be attempted to be executed adversely to the right of the appellant, he must resort to his remedy as in ordinary cases. *Jacobs* v. *Augustin*, 703.

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II. *Parties.*

10. The rule that all the parties to a judgment from which an appeal is taken must be made parties to the appeal, is only deviated from in the case of merely nominal parties, who are without interest. *Gibson* v. *Selby*, 317.

11. Where, on dissolving an injunction, judgment was rendered against the plaintiff and his surety *in solido* for interest and damages, and the former appeals, the latter must be cited as an appellee, or the appeal must be dismissed. He is not a merely nominal party. *Ib.*

12. The judgment of a court of the first instance, rendered in an action instituted by the owner of a building praying for a distribution of a balance due by him to the builder among the laborers and furnishers of materials who had presented him with their accounts under the provision of the stat. of 18 March, 1844, admitting any claimant to a participation in the fund, cannot be examined on appeal, where the party dissatisfied has not appealed from the decision. *Hale* v. *Wills*, 504.

13. Where a judgment has been rendered against one of two defendants, but in favor of the other, and the former appeals, but, asking no judgment against his co-defendant, does not make him a party to the appeal, and the plaintiff acquiesces in the judgment in favor of the latter by suffering it to become final without appealing therefrom, he cannot have the appeal dismissed on the ground that the defendant, in whose favor judgment was rendered, was not made a party to the appeal. *Campbell* v. *Arcenaux*, 558.

14. Where several terms have elapsed since the suggestion of plaintiff's death, and the making of an order authorizing the revival of the action in the name of her heirs, without any appearance by them or any one authorized to represent the succession, the court will, on motion, order a dismissal of the appeal at the next term, unless an appearance be entered before that time. *Martin* v. *Williams*, 582.

15. Where a plaintiff, after obtaining judgment, causes a *fi. fa.* to be issued, and propounds interrogatories to a third person under the stat. of 20 March, 1839, and obtains a judgment against him, in case of an appeal by the defendant from the judgment against the person interrogated, he must be made a party to the appeal, or it will be dismissed. Being interested in the judgment, it can neither be affirmed nor reversed without giving him an opportunity of being heard. *Copley* v. *Snow*, 623.

III. *Bond and Surety.*

16. The surety on an appeal bond will not be discharged by the failure of the Supreme Court to affirm for its whole amount, a judgment rendered below in favor of the appellee. The surety is bound for "what-

ever judgment may be rendered against the appellant." C. P. 579, 596. *Per Curiam:* If any portion of the appellee's demand be sustained by a judgment of the Supreme Court, the surety remains bound. *Diamond* v. *Petit*, 37.

17. Notice of a rule, taken against the surety on an appeal bond to show cause why he should not be condemned to pay the amount for which judgment was rendered against his principal, must be served on him, if a resident of the State, personally or at his domicil; if absent, but represented by an attorney in fact, service should be made on the attorney in fact, and the record should exhibit his authority. In neither case would service on a curator *ad hoc* be sufficient. *Ib.*

18. Where a suspensive appeal is allowed to a party, on his giving bond, with surety, in a certain amount, and the surety does not sign the bond, but writes on the back of it: "I am surety for the appellant for costs only on the within appeal bond, but not for the principal," the appeal must be dismissed for want of a sufficient bond. *Driggs* v. *Ballard*, 135.

19. Where plaintiff enjoins the execution of a judgment at the same time that he sues to annul it, and, on a judgment being rendered dissolving the injunction with damages and interest, appeals therefrom, giving bond with surety to pay such judgment as may be rendered on the appeal, the surety will be bound, in case of the judgment being affirmed, only for the damages, interest, and costs of the action of nullity, and not for the amount of the original judgment. *Greiner* v. *Prendergast*, 389.

20. Where on a suspensive appeal taken by the plaintiff from a judgment rendered against him, the condition of the bond was, "that the appellant shall prosecute his appeal, and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied out of the proceeds of the sale of his estate, if he be cast on the appeal, otherwise that the sureties shall be liable in his place," and the judgment on appeal merely decrees the appellant to be the slave of the appellee and gives the latter her costs, the sureties in the appeal bond cannot be made liable, in an action on the bond, in damages, for any injury sustained by the master from the loss of the services of the slave. The terms of the bond do not cover such a loss, and the liability of the surety cannot be extended. In such a case the judgment would be satisfied by delivering the slave and paying the costs; and the sureties cannot be made liable for the non-delivery of the slave, without having previously been put in default. *Cartwright* v. *McMillen*, 685.

IV. *Citation of Appellee.*

21. An appeal applied for by motion at a term succeeding that at which the judgment was rendered, will not be dismissed on the ground that the application should have been by petition in the ordinary form, and not by motion; but in such a case the appellee must be duly cited. Citation is only dispensed with when the motion is made at the term at which the judgment was rendered, the opposite party being, by a fiction of law, considered as then in court. Stats. 20 March, 1839, s. 19. 22 March, 1843, s. 1. *St. Avid* v. *Pichot*, 6.

22. Where an appeal is obtained on motion at a term subsequent to that at which judgment was rendered, and the appellant neglects to direct the clerk to issue a citation, and none is issued, the omission must be considered as imputable to the appellant and not to the clerk, and the former will not be entitled, under sec. 19 of the stat. of 20 March, 1839, to time to correct the error. *Ib.*

23. Where an appellee, by his attorney, writes at the foot of a petition for an appeal and of the order granting it, the words, "Service accepted," it will include a waiver of citation. *Hill* v. *Bowden*, 258.

24. The fact that the appellee himself, as a judge, granted the appeal, will not, when in the order granting the appeal he expressly declines to waive any of his personal rights as a litigant, excuse the omission to cite him. *Gibson* v. *Selby*, 317.

25. Where in the petition for an appeal there is no prayer for the citation of any appellee, the omission to issue citations will not be considered as negligence on the part of the clerk. *Ib.*

See Attorney at Law, 4.

V. *Record.*

26. Where further time has been allowed to an appellant to bring up the transcript, but it is not filed within the time thus allowed, and no further extension is obtained, but the transcript is subsequently filed, the appeal must, on motion, be dismissed. C. P. 883, 884, 885. *Copley* v. *Routh*, 189.

27. Facts which appear in the record only from a statement in the opinion of the inferior judge that they were proved, are not in evidence. The evidence itself must be produced. *Lee* v. *Bennett*, 218.

28. Where the record of appeal is not filed within three judicial days after the return day, and no extension of time has been obtained, the appeal must be dismissed, if required by the appellee. C. P. 585, 590. *New Orleans and Carrollton Railroad Co.* v. *Hood*, 226. *Penney* v. *Sommerville*, 668.

29. Where, through the neglect of an attorney, the record of appeal is not filed, nor any application for further time made, within three judicial days after the return day, the party cannot be relieved. The statute of 20 March, 1839, s. 19, was intended to relieve appellants, in certain cases, from the neglect of persons not in law representing them, such as clerks and sheriffs; but the fault of the attorney must be deemed to be the fault of the client. *Ducournau* v. *Levistones*, 245.

30. The appeal must be dismissed where the certificate of the clerk merely states "that the transcript contains a true, perfect, and correct transcript of all the records, documents, and proceedings had in the cause, *now on file* in the clerk's office." *Carpenter* v. *Reynolds*, 592.

VI. *Answer of Appellee.*

31. Where the answer of an appellee praying for an amendment of the judgment is not filed until the day fixed for the argument of the case, no amendment can be made. C. P. 890. *Riley* v. *Hart*, 186.

VII. *Motion to Dismiss.*

32. A motion to dismiss on the ground of informality in the mode of bringing up an appeal, must be made within three judicial days after the filing of the record. *Hall* v. *Nevill*, 326.

VIII. *Judgment on Appeal.*

33. A judgment allowing ten dollars for notarial copies offered in evidence, though not sustained by proof of the payment of so much, will not be reversed merely on that account. *Aliter*, where the attention of the lower court was specifically called to the charge as an exorbitant one, and it refused to correct it. *Bank of Louisiana* v. *Lawless*, 129.

34. A judgment will not be reversed for an error in condemning a party to pay a small portion of the costs, for which he was not liable, unless it be shown that the error was brought to the notice of the lower court, and that it refused to correct it. *McMullen* v. *Jewell*, 139.

35. A case will be remanded for further proceedings, where the irregularities in the mode of conducting it are such as to render it necessary in order to secure the rights of the litigants. *Exchange Bank* v. *Yorke*, 155.

36. Where the judgment of the court appears to have done justice between the parties, any error of the judge as to the legal principles which he applied to the case will be disregarded. *Cheevy* v. *Cummings*, 163.

37. Objections to the forms of proceedings, made for the first time after appeal, will be considered as having been waived, where the party by whom they are set up can suffer no injury thereby. *Brown* v. *Union Insurance Company*, 177.

38. The verdict of a jury on a question of fraud will not be set aside but for manifest error. *Slidell* v. *Rightor*, 199.

39. Though a bill of exceptions have been taken to the exclusion of testimony, if the testimony be not appended to the bill nor brought up with the record, and the bill sets forth no fact sworn to by the witness, nor shows in what respect the testimony was important, the court, being unable to determine if the testimony was material, will not remand the cause. C. P. 488. *Succession of Gray*, 443.

40. A case will not be remanded for further proceedings where there is an utter absence of legal service of citation. *First Municipality* v. *Christ Church*, 453.

ATTACHMENT.

I. *Will lie When.*

1. Defendant consigned tobacco to his factors in New Orleans, with directions to forward it to G. in Liverpool, and to send the bill of lading to M., defendant's agent in New York, and draw on M. for the expenses and for a certain sum to be placed to defendant's credit. A few days after defendant wrote to G., advising him that he had shipped the tobacco to his factors in New Orleans, to be reshipped to him, and of his having drawn on him, in favor of M., for a certain sum. Two days after defendant wrote, plaintiffs attached the tobacco in New Orleans. Defendant's draft was forwarded to M., and with it a duplicate of the bill of lading under which the tobacco was consigned to defendant's factors in New Orleans. The draft was negotiated by M., and carried to the credit of the defendant, in payment of whose drafts a portion of the proceeds was disbursed. The draft was subsequently accepted and paid by G. When M. heard of the attachment he remitted the balance of the proceeds of the draft to G., who intervened in the action, claiming the portion of the bill not covered by the remittance from M., with commissons and interest. Plaintiffs appealed from a judgment ordering the claim of the intervenor to be paid by preference to their attachment. *Held*, that no possession of the property vested in M. or G., by the transmission and receipt of the duplicate bill of lading, it having been made in favor of the defendant's factors, neither

M. nor G. being named in it; that the object of defendant in transmitting it, was, to fortify his representation that he had shipped to his factors, with orders to reship to G.; that, in accepting the draft, G. acted on the faith of defendant's representations and promise that the tobacco should go forward, and not upon any possession, for there was none; that defendant never lost, in a legal sense, his control over the tobacco, either as to his creditors or third persons, the consignees in New Orleans being his agents, and their possession his, they never having been the agents of the intervenor; that, at the date of the attachment, the intervenor had acquired no constructive possession nor privilege; and that the tobacco was subject to plaintiffs' attachment. *Aliter*, had the consignees in New Orleans written to G. or M., and advised them of the receipt of the orders, and of their intention to fulfil them, and the parties had acted on such advice, or, perhaps, had the consignees known that the draft on G. had gone forward; for an agent is not chargeable for a breach of orders, if his compliance would have been a fraud upon others. *Goodhue* v. *M'Clarty*, 56.

2. Where the owner of property has lost his control over it, and cannot change its destination, his creditors cannot attach; but whenever the owner can sell and deliver, the creditors may seize. *Oliver* v. *Lake*, 78.

3. An attachment will not lie in an action for damages *ex delicto*. *Greiner* v. *Prendergast*, 376. *Swagar* v. *Pierce*, 435.

4. Merchandize sold on a credit, for the price of which the notes of the purchaser had been received, or contracted to be sold for cash, where the price had not been actually paid, while still in the possession of the vendors, is liable to attachment for their debts. C. C. 1917. *Lee* v. *Bullard*, 462.

II. *Order allowing, Affidavit, Bond &c.*

5. An attachment will be set aside where there is either no previous order authorizing it to be issued, or no affidavit of the facts necessary to authorize the granting of an order, or no bond as required by law. C. C. 239, 243, 245. *Erwin* v. *Commercial and Railroad Bank*, 186.

6. An attachment must be dissolved, where a bond has not been given "exceeding by one-half the amount which the plaintiff claims," as required by art. 245 of the Code of Practice. And where the amount claimed is a sum, with interest, at a rate named, from a certain date, the amount of the bond must exceed by one-half the principal and interest due at the commencement of the action. Where a certain sum is claimed with interest, but neither the rate of interest, nor the time from which it ran, are specified, the claim for interest may be disregarded in fixing the amount of the bond. *Planters Bank* v. *Byrne*, 687.

III. *Service.*

7. A judgment cannot be attached by a seizure in the hands of the clerk of the court by which it was rendered, who is merely a keeper of its records, having no legal possession of, or control over it. *Dalcy* v. *Cunningham*, 55.

8. Where an attachment has been levied, by seizing in the hands of a person alleged to be the agent of a judgment debtor of defendant, the amount due to the defendant, plaintiff must show the existence of the judgment attached, the absence of the judgment debtor, and the agency of the person in whose hands the seizure was made, in order to establish legal service of the attachment. *Ib.*

9. Where a curator appointed to represent an absentee against whom a suit had been instituted, excepts to the jurisdiction of the court on the ground that, no property of the defendant's had been attached and no personal service of process made, the petition must be dismissed. *Peterson* v. *McRae*, 101.

10. Negotiable notes can be attached only by taking actual possession of them, or by seizing them in the hands of a third person who holds them for the use of the defendant in attachment. *Erwin* v. *Commercial and Railroad Bank*, 186.

IV. *Privilege.*

11. An attachment gives a privilege to the creditor on the property attached. C. P. 264, 265. An attachment is given with express reference to a future judgment and an execution thereon; and the seizure under the execution relates back to the date of the attacement, and gives effect to the privilege from that time. And where several attachments are levied on the same property on the same day, though at different times, the order of the seizure determines the right of priority. C. P. 723. *Tufts* v. *Carradine*, 430.

12. The general rule that the law admits of no fractions of a day, is subject to numerous exceptions. There are cases in which the law expressly forbids the different hours of the same day from being recognized as affecting the rights of parties; but the prohibition must be confined to the cases enumerated. *Ib.*

V. *Costs.*

13. Where an attachment is set aside,

the costs must be paid by the plaintiff. The sheriff has no right to retain the property, until his costs are paid; and when he refuses to deliver it to the defendant under such a pretext, he will be answerable for any injury the latter may sustain thereby. *Green* v. *Garcia*, 702.

ATTORNEY AT LAW.

1. A contract between an attorney and client, by which the latter agrees to give to the former one-third of the judgment to be recovered, is void under the stat. of 31 March, 1808, s. 4. *Morgan* v. *Driggs*, 124.

2. No recovery can be had in an action on a contract by which defendant stipulated to pay a certain amount for services to be rendered by an attorney in a suit then about to be commenced, where there is no allegation that the attorney had fulfilled his part of the contract. *Ib.*

3. An attorney at law, in whose hands a note has been placed for collection, has no power, by an agreement made out of court, to give an extension of time to the principal obligor, where the immediate legal consequence would be, if the act were valid, to release the sureties on the note. *Roberts* v. *Smith*, 205.

4. Acceptance of service of a petition of appeal by an attorney at law will be presumed to have been authorized by his client, unless the latter, by his own affidavit or otherwise, shows that the attorney transcended his authority. *Hill* v. *Bowden*, 258.

5. Where an attorney presents a claim for professional services, and payment is refused, he cannot recover a larger amount for the same services, unless the first claim be shown to have been made in errror. He will be concluded by his first claim. *Succession of Flower*, 292.

6. Article 71 of the constitution, which prohibits any court from making "any allowance by way of fee or compensation in any suit or proceedings, except for the payment of such fees to ministerial officers as may be established by law", does not effect the right of an attorney or counsellor to recover the value of his services in an action, or in any other legal mode in which the parties may present the claim for adjudication. *Succession of Macarty*, 517.

7. The authority of an attorney of record is presumed. It cannot be impugned by a mere suggestion. *Campbell* v. *Arcenaux*, 558.

8. An attorney at law is authorized to receive partial payments on account of any claim put in his hands for collecton. *Pickett* v. *Bates*, 627.

See Donations, 24. Payment, 11. Shipping, 4. Successions, 6, 14.

BAIL.

See Criminal Law, III.

BANK.

1. Under the stat. of 1st April, 1833, incorporating the Citizens' Bank, that bank was authorized to take mortgages to secure the repayment of stock-loans made by it. *Citizens Bank* v. *Nicolas*, 112. *Eyssallenne* v. *Citizens Bank*, 663.

2. The power conferred on the Board of Currency, by the stats. of 5 February 1842, s. 2, and 14 March, 1842, ss. 15, 27, 28, 29, of requiring that the books, papers, and minutes of the proceedings of the board of managers and directors appointed to liquidate the affairs of the Citizens Bank should be subject to examination by them, and of supervising the proseedings of the managers and directors, was not repealed by the subsequent statutes of 5 April, 1843, s. 8, and 6 April, 1847. *Board of Currency* v. *Citizens Bank*, 346.

3. Article 144 of the new constitution which provides that no office shall be superseded by the taking effect of the constitution, but that the laws relative to the duties of the several officers shall remain in full force though contrary to the new constitution, and the duties thereof shall be performed by the respective officers according to the existing laws, until the organization of the government under the new constitution, and the entering into office of the new officers to be appointed under said government, authorized the secretary of state and treasurer to continue to discharge the duties of members of the Board of Currency after the taking effect of the new constitution, though membership of the board was a civil office of emolument distinct from that of secretary of state or treasurer, and involved the exercise by them, at the same time, of two civil offices of emolument contrary to article 126 of the new constitution. *Board of Currency* v. *Citizens Bank—Rehearing*, 350.

4. Under the stat. of 6 April, 1843, sec. 2, the commissioners for the liquidation of banks were entitled to compensation at the rate fixed by that section, until supersed by the appointment of a liquidator under the stat. of 4 May, 1847. The salaries allow-

ed by the stat. of 1843, were not limited to the period of four years, mentioned in section 25 of the stat. of 14 March, 1842. *Matter of the Merchants Bank*, 382.

CORPORATIONS, 1 to 4.

BANKRUPT.

1. A bankrupt discharged from his debts unber the act of Congress of 19 August, 1841, is still bound *in foro conscientiæ*, and this obligation is a sufficient consideration for a new promise. C. C. 1752. But there can be no legal obligation to pay such debts without a new agreement, which may be verbal, or be proved by presumptions where the known fact on which the presumption rests draws after it the unknown fact as an almost necessary consequence. C. C. 1810, 2267. The presumption must be precise, and inapplicable to other circumstances than those intended to be established. *Bach* v. *Cohn*, 101.

2. Where defendant sets up a discharge under the bankrupt law of the United States of 19 August, 1841, and plaintiff alleges in an amended petition that the discharge was obtained by fraud, but without sufficient specification, he may afterwards, in vacation, and without any order from the judge at chambers, file with the clerk a notice to the defendant specifying the acts of fraud intended to be proved; and a copy of this notice, if served on defendant in time, will suffice; the act of Congress of 1841, which controls this subject, requiring only, "prior reasonable notice, specifying the fraud or concealment." It is not necessary that the specification should have formed part of an amended answer. *Drake* v. *Jones*, 638.

See INJUNCTION, 6. LAW, 1. PLEADING, 2, 13.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See PRESCRIPTION, 14, 20, 26.

I. *Title to, and Transfer.*

1. Where a promissory note is lost by a special endorsee, payment of its amount to a third person who had acquired no lawful title to it, will be no defence to an action by the true owner. *Hebert* v. *Woods*, 254.

2. Express notice is not necessary to charge the holder with what the law considers to be notice of any defect or infirmity in a note or bill, so as to let in a defence against a holder for value; it is sufficient, if the attending circumstances are of such a positive and pointed character as to cast a shade on the transaction, and to put the holder on enquiry. *State Bank* v. *Navigation Company*, 294.

3. Where an endorsement is by an agent, or person not acting in his own right, and there is a direct reference in the body of the instrument to the procuration or authority under which the endorsement is made, one who holds the instrument by virtue of the endorsement is charged with notice of the power under which it is made. So in an action against a municipal corporation on an instrument endorsed by the corporation, in the body of which were these words: "In conformity with the resolutions of the council of said municipality, bearing date the 29th July and 5th August last," the holder will be held to have had notice of the resolutions, and his right to recover will depend on their validity, and on that of the acts done under them. *Ib.*

4. Where a check on a banker is received in payment during banking hours of the day on which it was drawn, in the usual course of business, and under circumstances not calculated to excite suspicion, and no negligence is shown from which bad faith can be inferred, the holder may recover the amount against the drawer, though the check was lost by, or stolen from, the real owner. *Marsh* v. *Small*, 402.

See QUASI-CONTRACTS, 4.

II. *Rights and Obligations of Parties.*

5. Where one of the makers of a joint note, subsequently assumes the payment of the whole amount, the holder will be entitled to the benefit of the assumption. C. C. 1884, 1896. C. P. 35. In such a case it will be unnecessary to join his co-obligor in the action. *Bank of Louisiana* v. *Lawless*, 129.

6. The holder of a bill is allowed to profit by an accidental payment, though the drawer's name be forged, when there has been an interval between payment and notice to him of the forgery, and his situation has been altered to his prejudice, either in fact or in legal presumption. The rule that payment by the drawee admits the genuineness of the drawer's signature, and that the former is thereby legally estopped from disputing it, is only true in this qualified sense. *McCall* v. *Corning*, 409.

7. Acceptance of a bill is not an admission of the payee's signature. *Ib.*

8. The holder of a bill, upon which the payee's endorsement is forged, cannot recover from the acceptor, whose engagement is to pay according to the tenor of the bill, that is, to the payee himself, or his genuine order. *Ib.*

9. A *bonâ fide* holder of a bill, of which the payee was a fictitious person, ignorant of

the fact, may recover against an acceptor who knew that the payee was a fictitious person; but an acceptance without knowledge by the acceptor of the fictitious character of the payee, is completely void. *Ib.*

10. Where the holder of a bill endorses, and presents it for payment to the acceptors, he must be considered as representing, if not as warranting, to the acceptors, the genuineness of the endorsement of the payee, and where the payee's endorsement proves to have been forged, the acceptors, who have paid upon a false representation, however innocent, may recover the amount from the holder; and the holder will have the same remedy against his prior endorser, that the acceptors have against him. *Ib.*

11. Where a bill, on which the names of the drawer and payee are proved to be forged, is accepted and paid through error, to an endorsee who acted as agent of a prior endorser, but whose agency was not disclosed at the time, the amount of the bill having been paid by the first endorser to the forger; and it is shown that the acceptors, as soon as they ascertained the forgery, communicated the fact to the holder, and demanded the return of the money, before the latter had paid it over, which was refused, and the good faith of the acceptors, the holder, and of the principal is admitted, the acceptors will be entitled to recover back the amount so paid in error. C. C. 2279, 2280, 2281, 2283. *Ib.*

12. An accommodation endorser of a promissory note has no right, on being sued, to require the previous discussion of the property of the drawer. *Thompson* v. *Kelso*, 577.

13. Where a note was made by an individual, and endorsed by several persons for his accommodation, to enable the maker and the plaintiff to carry on a partnership, and was delivered by the maker to his partner during the existence of the partnership, the endorsers must be considered as mere sureties, whose obligations are limited by that of their principal, the maker; and, to enable the plaintiff to recover against one of the endorsers, a settlement of the partnership must have been made. *Johnson* v. *Downs*, 590.

III. *Presentment for Acceptance.*

14. The object of the rule under which, in every instance of presentment of a bill for acceptance, the drawee is entitled, if he require it, to twenty-four hours to consider whether he will accept, is not to enable him to inquire as to the holder's title, but to ascertain whether he have effects of the drawer, or the prospect of them, or other reasons for honoring the bill; and the acceptance of a bill at once, without taking advantage of this delay, is not of itself evidence of negligence or incautiousness, in not inquiring as to the title of the holder. *Wilcox* v. *Beal*, 404.

15. The drawee, with whom a bill has been left for acceptance, holds it as a deposit; and the retaining of the bill in violation of the deposit is a species of theft. The fact that the owners of the bill were indebted to the drawee for more than its amount, gives the latter no semblance of a right to retain it. No compensation takes place under such circumstances. C. C. 2207. *Per Curiam:* A party will never be permitted to take advantage of his own wrong, nor to put his adversary in a worse position by a gross dereliction of duty on his part. *Forsyth* v. *Martin*, 514.

IV. *Presentment for Payment, Protest and Notice.*

16. Where a note was payable at a bank, proof that no funds had been placed there to pay the note, either at maturity or since, down to the time of trial, will excuse the omission to apply there for payment. *Bent* v. *Lowe*, 88.

17. Where the record of the certificate of notice to an endorser of the protest of a note appears to have been made in the presence of two witnesses, but it does not appear that they signed it, the record not being in conformity to the statutes of 14 February, 1821, s. 1, and 13 March, 1827, s. 1, the certificate will not be proof of notice, and a certified copy of it should not be admitted in evidence. *Davis* v. *Bourgeat*, 121.

18. Where a note is payable at a particular counting-house, notice of non-payment to the maker is unnecessary. *Bank of Louisiana* v. *Lawless*, 129.

19. Where a note payable at a bank is held by the bank itself, presentment for payment to the bank by the notary employed to protest it, would be a vain formality. *Barrow* v. *Thibodaux*, 131.

20. The drawer of a bill is not entitled to notice of non-payment by the acceptors, where the acceptance was for his accommodation, and he had undertaken to send funds to them with which to pay it, and failed to do so. *Gillespie* v. *Cammack*, 248.

21. Where it is shown that there were two post-offices, one about three-and-a-half or four miles from the residence of the endorser of a note but on the opposite side of a wide and rapid river, and the other about six miles from his residence, but on the same side of the river, and it is not proved that he received his letters from either exclusively or uniformly, notice of protest sent my mail directed to the latter will be good. *Per Curiam:* The plaintiffs may have fairly considered the latter as the most convenient,

and practically the nearest to the endorser's residence. *Bank of Louisiana* v. *Carl*, 272.

22. In the absence of evidence to justify it, the address of a notice of protest, generally, to the parish of the endorser's domicil, is not sufficient. *Ib.*

23. The stat. of 13 March, 1827, was intended to provide a convenient and permanent mode of proof of notice of protest: but not to change the rules of commercial law on the subject of notice. *Ib.*

24. It is not essential to the legality of a notice of protest that it should be addressed to the post-office at which the party was in the habit of receiving his letters, *eo nomine*. If it be so addressed that, in the ordinary course of transportation by mail, it would go to, and be retained at, that office, it is sufficient. *Ledoux* v. *Morgan*, 344.

25. Where a notice of protest is addressed according to information derived from the city factor of the party notified, due diligence will be considered to have been used to ascertain the proper address. *Ib.* 344.

26. Reasonable diligence to ascertain the residence of an endorser of a bill or note, is all that is necessary to excuse a failure to address the notice to the proper office; it is not required that the diligence should be successful. *Canal Bank* v. *Morgan*. 356.

27. Sec. 3. of the stat. of 13 March, 1827, does not make it necessary that notice of protest should be addressed to the place where the note or bill was drawn, when the information obtained by the notary as to the residence of the endorser was of a character to create a reasonable belief of its correctness. *Ib.*

28. Though a bill was accepted for the accommodation of the drawer, yet if he have funds in the hands of the acceptor at maturity, though insufficient to pay the whole amount of the bill, he is entitled to notice of dishonor. It is not enough to relieve the holder from the necessity of giving notice, that the acceptance was for the accommodation of the drawer; there must be something equivalent to an express agreement to waive notice. *Lacoste* v. *Harper*, 385.

29. The stat. of 14 March, 1844, authorizes notaries in the city of New Orleans to employ deputies to make presentments, and demands of payment, of bills and notes. The words of the statute—"in the making of protests," must be understood in an enlarged and popular sense, as comprehending whatever is necessary to the validity of a protest. *Citizens' Bank* v. *Bry*, 630.

30. Where a deputy, appointed by a notary in the city of New Orleans, under the stat. of 14 March, 1844, makes demand of payment of a bill or note, it is not necessary that the deputy should certify the official act. The notary may certify the acts of his deputy, as well as his own. *Ib.*

V. *Release of Parties.*

31. Where an accommodation endorser of a note joins in an act executed by the maker and holder, before the maturity of the note, by which certain securities are given for its payment, and the time of payment is deferred, declaring that he agrees to the arrangement, and holds himself liable for the final payment of the note "as endorser or security" notwithstanding the postponement, and it does not appear from the terms of the agreement that any change was to be made in the obligations of the debtors adversely to the creditor, the use of the words "endorser or security" will not be considered as releasing the endorser from the obligations of his endorsement, and binding him merely as a surety. As to the maker, he was merely as a surety, and the words must be considered as used in reference to him. C. C. 3008. *Thompson* v. *Kelso*, 577.

VI. *Damages.*

32. Where, at the date of a bill, a statute was in force allowing damages at ten per cent in case of protest, the right to damages at that rate must be considered as part of the contract. A subsequent statute reducing the rate, though in force at the time of suit, cannot affect the right of the creditor to damages at the rate fixed by the statute in force at the date of the contract. *Gillespie* v. *Cammack*, 248.

VII. *Evidence.*

33. It is unnecessary to prove the endorsement of plaintiff's immediate endorser, when that of the payee is in blank. *Bank of Louisiana* v. *Lawless*, 129.

34. Where plaintiffs sue on a note payable to their order, expressed on its face to be for value received, claiming the privilege of vendors, and asking for a sequestration on the allegation that the note was given for merchandize sold to defendants, it is unnecessary to prove the consideration to entitle plaintiffs to a judgment on the note. The allegation is only material so far as the right to a sequestration, and judgment for a privilege, is involved. *North* v. *Traxler*, 136.

35. Where a person endorsed negotiable paper of a short date in the county of his late domicil, which the holder had reason to believe was still his domicil, and on being sued as endorser resists the action on the ground that his domicil was in another State and that notice of protest should have been sent to him there, he will be required to es-

tablish not only that he had abandoned his former, and acquired a new domicil, but must also show affirmatively that he had given reasonable publicity to the fact, and had left behind him reasonable means of ascertaining his new domicil. *Somerville* v. *Young*, 290.

36. Where in an action on a negotiable instrument the defendants put in issue the *bona fides* of the holder, by expressly charging privity, and notice of the original consideration on which it was issued, it is incumbent on him to show from whom, and for what consideration, he received it. *State Bank* v. *Navigation Co.*, 294.

37. Where a note expresses on its face that it was given for value, a denial of consideration, unsupported by evidence, is not enough to impose on the plaintiff the burthen of proving the consideration. *Dubroca* v. *Husband*, 331.

38. In the absence of evidence to the contrary, an endorsement will be presumed to have been made at the place where the note was executed. *Halch* v. *Gilmore*, 508.

39. The statement of a notary of the city of New Orleans, made in a protest and certificate of notice, that a note was presented and payment demanded, and notice to the endorsers mailed, by V. D., "his lawful and duly sworn deputy," is sufficient evidence of the appointment and oath of the deputy, though the appointment and qualification of the deputy be expressly denied. No proof *aliunde* is required. Stat. 14 March, 1844. The stat. of 1844 authorizes a notary in New Orleans to act by deputy, and to certify to what is done by such deputy. *Citizens' Bank* v. *Bry*, 630.

40. Where a bill purports on its face to be drawn on a letter of credit, the possession of the letter by a third person, the holder of the bill, with an endorsement on it made by the drawer of the bill, showing that it was drawn under the letter of credit, is *primâ facie* evidence that the bill was taken on the faith of the letter. *Nisbett* v. *Galbraith*, 690.

VIII. *Letter of Credit.*

41. Where a letter of credit addressed by one person to another, authorizes the latter to draw on the former to a certain amount, in sums to suit the convenience of the party to whom it is given, and the letter was evidently intended to be exhibited to third persons to induce them to take the bills so drawn, the promise which the letter contains is a promise to any one taking a bill on the faith of the letter; and any advance made on its faith is a sufficient consideration to entitle the holder, in the absence of any evidence that the letter had been revoked or the amount of the credit previously exhausted, to recover against the writer of the letter; damage to the party taking the bill being as good a consideration, as benefit to the writer of the letter. *Nisbett* v. *Galbraith*, 690.

CESSIO BONORUM.

1. A judgment homologating a tableau of distribution presented by the syndic of an insolvent will be reversed, where the notice to the creditors of the filing of the tableau was published without any order for publication. *Michael* v. *Creditors*, 336.

2. The acceptance by the judge of the *cessio bonorum* made by an insolvent does not vest the property absolutely in the creditors, so as to confer on them a right of ownership, or dominion over it. The property remains in their hands only as a pledge, which they are bound to have sold, in order to distribute the proceeds among themselves, and to pay the surplus, if any, to the ceding debtor. The cession is not a giving of property by the insolvent in payment to his creditors, by which interest is arrested. The interest forms a part of the debt, which the creditor has a right to exact till the entire payment of his demand; consequently where the property surrendered is sold on a credit interest is due, not to the date of the sale only, but to the time of the distribution. *Smalley* v. *Creditors*, 387.

3. Where a debt, originally evidenced by a note, but subsequently merged in a judgment, is placed on the schedule of an insolvent, the debt, whether described in the schedule as a judgment or a note, will vest in the syndic in the form in which it existed at the date of the cession. If the erroneous description of the debt, as being by note instead of judgment, was fraudulently made, and injured the sale, the creditors alone can complain. *Ib.*

4. It is the duty of syndics to administer estates confided to them with economy, and, in case of any abuse of their trusts in this respect, the creditors will be relieved. *Ib.*

5. Where a creditor, who had wrongfully obtained certain merchandize from the shop of his debtor, on the eve of his cession, in satisfaction of the claim, has a judgment rendered against him in an action by the syndic for the value of the merchandize, he cannot plead in compensation of the judgment the debt, evidenced by a note, due from the insolvent to him. His only right is to a proportional share of the funds of the insolvent when distributed. *Yale* v. *Nolan*, 449.

6. A promise to pay a debt made by the debtor, after a *cessio bonorum*, will support an action, whether the insolvent was dis-

charged by his creditors or not. If not discharged, the legal obligation resting on him is to pay those creditors whose demands accrued prior to the cession, on his acquiring property more than sufficient for his maintenance and for the discharge of debts subsequently contracted; and the only remedy of the prior creditors is to require a new surrender. C. C. 2173. Stat. 20 February, 1817, s. 23. The subsequent promise creates a new debt, which may be recovered in a separate action without requiring a new surrender. Though the debtor have been fully discharged, the previous debt is a sufficient consideration for the subsequent promise. C. C. 1752. *Beck* v. *Howard*, 501.

7. Prescription against the creditors of an insolvent is suspended by a *cessio bonorum*. The property ceded to by the insolvent is the common pledge of his creditors; and that pledge continues as long as there are assets to be divided. *West* v. *Creditors*, 529.

8. In all cases of insolvency, whether the insolvent be dead or alive, his property is the common pledge of his creditors, and each creditor is a third person as to all the others, and may avail himself in the *concurso* of all equities existing between them and the insolvent or his succession. *Orr* v. *Thomas*, 582.

9. The syndic is a mere nominal party to a tableau of distribution of the effects of an insolvent, except so far as his claims for commissions, etc., are concerned. The creditors, *inter se*, are the real parties litigant. *Coiron* v. *Millaudon*, 664.

10. Where, after the death of the syndic of the creditors of an insolvent, an account of his administration as syndic is presented by his executor, with a tableau of distribution which is litigated and homologated, the creditors not having deemed it for their interest to provoke the appointment of another syndic, one who holds a debt which, at the time of the cession, belonged to a creditor who was represented by the attorney of absent creditors, will be concluded by the judgment of homologation in any attempt to annul a sale made by the syndic. Objections to the proceedings should have been made before they were closed by the distribution of the proceeds of the property sold. *Ib.*

11. Where a court, which had accepted the cession of the property of an insolvent, homologates a tableau distributing the proceeds of the sale of the property surrendered, the judgment of homologation will be conclusive upon creditors who were parties to it, in the absence of any fraud or collision, and though the sale was made without any order of court. *Per Curiam:* The court having distributed by its decree the proceeds of the sale of the property, as such—*eo nomine*—the sale itself and the right to sell were thereby settled. The creditors who received the proceeds, and those who sanctioned the appropriation to debts which they had an interest in discharging, are equally bound by the judgment, the law considering them parties to it. *Ib.*

12. Where the validity of the sale of the effects of an insolvent is attacked on the ground of the nullity of the whole proceedings in consequence of the creditors not having been cited, evidence of meetings of the creditors, held under orders of court, who advised a sale and fixed the terms, and of the homologation of the tableau, are sufficient to sustain the sale. *Ib.*

See JUDGMENT, 15.

CHARITY HOSPITAL.

The charge of five hundred dollars imposed by sec. 4 of stat. of 12 March, 1838, on theatres in New Orleans, for the benefit of the Charity Hospital, is due every year. *Charity Hospital* v. *Stickney*, 657.

CITATION.

1. An omission to serve the petition and citation on the defendant is not cured by service of a writ of arrest; nor can the appearance of the defendant, by counsel, on a motion to set aside the arrest, be considered a waiver of service of citation and petition, nor as authorizing the presumption of an acknowledgment of such service. *Jacobs* v. *Sartorius*, 9.

2. An omission by the clerk to state in the copy of the petition served on the defendant the date when the original was filed, is immaterial. *Bank of Louisiana* v. *Lawless*, 129.

3. Where the return on a citation shows that it was served "on a free white person, apparently above the age of fourteen years, who was working at the sugar house at the domicil of the defendant, who was absent at the time," the service is insufficient. It should have shown that the person on whom it was served lived in the house of the defendant, as required by art. 189 of the Code of Practice. *Thibodaux* v. *Wright*, 130.

4. In an action against a religious corporation, service of citation must be made on the president of the corporation in person, "or at their office, if they hold such in permanence, by delivery to some of their agents." *First Municipality* v. *Christ Church*, 453.

5. The declaration of a sheriff on a return on a citation that A. is agent o B., is not

proof of the fact; and such a return, unaccompanied by proof *aliunde*, will not authorize a judgment, at least where A. is not designated in the petition as such agent. *Ib.*

See APPEAL, 6. 21 to 25. EXECUTORY PROCESS, 2, 6. SUCCESSIONS, 29.

CLERK.

Clerks of courts, except in cases specially provided for by law, are authorized to administer oaths only in open court. *State* v. *Isaac*, 359.

See ATTACHMENT, 7. CRIMINAL LAW, 4. EVIDENCE, 26.

CODES, ARTICLES OF, CITED, EXPOUNDED, ETC.

I. *Code of* 1808.

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II. *Code of* 1815.

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173	618	538	489	987	"
174	556	539	600	1036	565
175	687	542		1040	502
183	600	to	494	1062	624
185	556	549		1114	261
190	100	556	"	1119	150
193	467	557	600	1139	533
239	186	575	175	1141	353
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267	610	579	175	1192	355
268	582	"	489	1196	"
327	582	661	482	1457	494
"	611	662	440	1458	"
328	562	670	"	1459	"
"	611	671	"	1468	239
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341	"	696	567	1507	432
342	328	697	"	"	494
"	362	700	487	1508	494
420	294	701	"	1509	"
423	541	702	"	1513	230
424	19	703	"	1581	579
429	294	768	134	1588	"
1589	579	2207	514	2738	285
1600	705	2218	533	2772	19
1602	"	2254	522	"	319
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1679	705	2260	142	2841	319
1752	101	"	174	2895	157
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1796	523	"	600	2992	98
1798	"	2279	409	3006	294
1805	468	2280	"	3008	255
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1810	101	2283	"	3012	365
1811	468	2304	670	3014	"
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1884	129	2372	611	3026	674
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1896	129	2382	279	3046	492
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"	326	"	337	3214	447
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1989	627	2589	84	3219 § 5	428
2023	274	2597	326	3220	436
2033	"	2598	"	3221 § 5	428
2053	527	2599	"	3233	436
2073	162	2601	150	3236	"
2075	"	2613	220	3238	600
2088	574	"	222	3239	198
2122	444	2614	220	3244	133
2157	66	2617	716	3277	112
"	396	2619	"	3278	600
2162	351	2622	626	3282	58
2173	501	2623	552	3318	478
2180	326	"	626	3319	"
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"	552	"	464	3524	"
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III. *Code of Practice.*

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49	"	420	"	734	268
53	"	488	443	735	"
98	434	491	660	746	253
103	556	494	150	"	693
149	366	"	196	"	698
152	365	495	"	747	693
163	637	532	660	"	698
170	434	536	"	754	434
172	366	546	62	755	272
173	223	549	702	756	434
175	"	550	"	782	247
189	130	560	646	883	189
196	136	567	115	884	"
207	275	574	135	885	"
229	62	575	37	887	37
245	688	579	"	888	"
264	430	589	245	"	222
265	"	594	339	890	198
273	267	596	37	"	222
274	"	607	646	"	380
304	466	608	453	"	444
313	69	609	"	905	37
325	323	664	147	983	637
347	272	671		989	323
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393	366	684	"		
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COMMUNITY.

See MARRIAGE, 8, 11, 13, 14, 15, 17 to 21.

COMPENSATION.

See BILLS OF EXCHANGE, ETC., 15. CESSIO BONORUM, 5. MANDATE, 1. PLEADING, 10. SUCCESSIONS, 25.

CONSTITUTION.

I. *State Constitution of* 1812.

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III. *Constitution of the United States.*

Art. 4, sec. 2, § 3 - - - - - page 339

CONTESTATIO LITIS.

When in an action for the price of work, alleged in the petition to have been done under a verbal contract, defendant answers that there was a written agreement, which he annexes to his answer, and plaintiff on the same day files a supplemental petition declaring that, though the work was commenced under a verbal agreement a written agreement was subsequently made and then in possession of defendant, and the latter goes to trial without objecting that no default had been taken or issue joined on the supplemental petition, the substance of the demand not being changed by the supplemental petition, and there being no surprize, the informality will be considered to have been waived. *Battaile* v. *O'Neil*, 229.

CONTINUANCE.

1. A continuance should be granted where, from unforeseen illness, the only counsel of a party is unable to attend at the trial, and the case is a complicated one, and his clients are absent, residing at a distance from the place of trial, and there is no reason to believe that the application for a continuance was made for delay. The fact that a case had been long pending, will not authorize the refusal of a continuance, where the delay does not appear to be imputable to the party applying for it. *Marrero* v. *Nunez*, 54.

2. Where on the day fixed for the trial of a case, plaintiff's counsel suggests orally the death of the plaintiff, but declines to support the suggestion by his affidavit, or further to appear in the case, judgment of non-suit must be rendered. The suggestion of plaintiff's death should have been supported by the affidavit of the attorney, or by other testimony rendering the death probable. *Hawkins* v. *Dartest*, 547.

CORPORATIONS.

1. Incorporated trading companies are not partnerships, according to the legal principles applicable to partnerships formed by the voluntary agreement of individuals. The association of the share-holders does not constitute a partnership according to the custom of merchants, nor within the principles of law established respecting joint traders. Corporations are to be treated with reference to the objects of their creation, and to the express powers with which the legislature may have invested them; and, to that extent, the general law of partnership is superseded by the charter. *Purton* v. *New Orleans and Carrollton Railroad Co.*, 19.

2. Where the charter of an incorporated trading company declares that its capital shall consist of a certain sum, divided into shares of a certain amount, to be paid in at such times and in such proportions as may be required by the president and directors, but does not oblige the directors to call in the whole amount of the shares, though the share-holders will be liable to third persons for the full amount of their subscriptions, whether called in or not, yet the adoption of a resolution by the president and directors making the call, being an uncertain event, forms a condition which, as between the share-holders themselves, suspends the obligation to pay the balance of their subscription until a call is made as provided by the charter. *Ib.*

3. The charter of a banking company provided that its capital should be divided into shares of $100 each, of which $5 shall be paid at the time of subscribing for the shares, and the residue in such instalments and at such times, as might be required by the diretors. $50 on each share having been called in and paid, a resolution was subsequently adopted by the directors, providing "that any stockholder who shall pay in anticipation a part, or the full amount due on the stock held by him, shall be entitled to dividends thereon in proportion to the amount so paid in." *Held*, that the payment of the stock in full under the resolution of the board of directors cannot be considered as a loan to the company of the sum thus paid above the amount called in; that the contract between those who thus paid in full and the company, was a contract of partnership (C. C. 2772), the consideration stipulated being, a participation in the profits of the company, and not interest; that being entitled to receive the whole profits made upon the additional sum paid, they cannot be exempted from contributing to losses on that amount; that even an express stipulation to exempt them from such contribution, had it been made would be void, both as to the partners and third persons (C. C. 2785); that the shares were necessarily unequal; and that the inequality exists for the purposes of liquidation as well as for the division of profits *Ib.*

4. The separation of the administration of the banking business of a company from the other business of the corporation, for the purpose of winding up the former, under the provision of sec. 7 of the stat. of 5 February, 1842, and sec. 27 of the stat. of 14 March, 1842, could produce no change in its obligations to its creditors or stockholders; and an injunction will be granted to restrain the officers of the company from paying any dividend to the stockholders, while there are any debts created by its former banking operations, unpaid or unprovided for. *New Orleans* v. *Commercial Bank*, 96.

5. Though the neglect of the corporators to re-appoint officers may, in certain cases, suspend the existence of the corporation, it cannot be thus extinguished to the injury of its creditors. *Per Curiam:* A corporation never can dissolve itself so as to defeat any of the just rights of its creditors. *Brown* v. *Union Insurance Company*, 177.

6. Where the members of a corporation neglect to appoint officers, to the injury of its creditors, the court will appoint a manager to wind up the company. *Ib.*

7. Where no period was fixed by the charter of an incorporated company for the payment of a portion of the subscription for each share of stock, but the directors were authorized to call in the amount at such times and in such proportions as they might see fit, a creditor of the company who wishes to enforce payment of the balance so due, must resort to a direct action. The liability of a stock-holder for this balance cannot be enforced by proceedings authorized by section 13 of the stat. of 20 March, 1839. In such a case as no period was fixed for the payment of the balance due on the stock, no prescription can accrue against an action by a creditor of the company. *Ib.*

8. Where a share-holder in an incorporated company not inhibited by its charter from dealing on credit, resists an action instituted to compel him to contribute to the payment of a note issued by the company on the ground that it was not authorized to issue notes, he must allege and prove that the note was given for purposes unsanctioned by, and prejudicial to, the share-holders, and that the holder was apprized of these facts when he took the note, or that he received it after maturity. *Ib.*

9. Corporations will not be held responsible for the errors of their agents in pleading, or in defending suits. *Delabigarre* v. *Second Municipality*, 230.

10. The powers of those charged with the local government of internal divisions of the State, and of cities and towns, are merely administrative, except where express authority has been given by law. C. C. 420, 429, 430. *State Bank* v. *Navigation Co.*, 294.

11. No express authority is given to the officers of municipal corporations to enter into the contract of suretyship; nor is there any general authority from which the power to enter into such an engagement can be implied, or fairly deduced, under a plea of usage, necessity or convenience, or public interest. *Ib.*

12. Where the powers of officers of municipal corporations have not been expressly determined, they must be regulated in the same manner as those of other agents (C. C. 430); and to bind the corporation, by drawing or endorsing bills of exchange or promissory notes, their authority must be express and special. C. C. 2966. *Ib.*

13. A corporation, being the creature of the law, possesses only those powers which the charter creating it confers, either expressly, or as incidental to its existence. *Ib.*

14. The corporation of a town cannot be made liable for damage to an individual occasioned by an obstruction in the street, where the injury might have been avoided by ordinary care on the part of the plaintiff. *Per Curiam:* We are not to be considered as recognizing, under our legislation, the right of action of an individual, in any case, against a town corporation for damages in consequence of accidents occasioned by the condition of roads, streets, or highways. *Moore* v. *Shreveport*, 645.

15. A resolution of a municipal corporation, directing a soap factory in a particular street to be removed within a certain time unless put in such a condition as not to be a nuisance, and imposing a fine of $50 on the parties interested in the factory for every infraction of the resolution, in case, after the time limited, complaint should be made, by any three inhabitants under oath, that said factory continues to be a nuisance, is illegal, and cannot be enforced. Stats. 7 June, 1806, s. 1; 14 March, 1816, s. 1. *Per Curiam:* A fine is a pecuniary punishment for an offence against the laws of the municipality. An ordinance imposing a fine is a penal enactment; and must be general in its operation. An ordinance may impose fines on persons carrying on offensive trades in a certain street, or suburb, or district, where they would be injurious to the public health; but an ordinance designating one individual, or one establishment, and subjecting the owners to punishment, is contrary to common right. *First Municipality* v. *Blineau*, 688.

COSTS.

See ATTACHMENT, 13. INJUNCTION, 2.

COURTS.

1. The sittings of the late District Court of the First District were divided into monthly terms. Stats. 10 February, 1813, s. 5; 29 April, 1824. *St. Avid* v. *Pichot*, 6.

2. Decision in *Dupuy* v. *Bemiss*, 2 An. 509, as to the jurisdiction of the courts of the United States touching successions under administration, affirmed. *Stockton* v. *Stanbrough*, 390.

3. Where a court is called upon to enforce a right, it may avail itself of its jurisdiction over the person to do justice relative to a subject matter beyond its jurisdiction, though lands be affected by the decree. *McDowell* v. *Read*, 391.

4. A court of Probates, under the judicial organization anterior to the constitution of 1845, was not without jurisdiction of actions in which the title to real estate was incidentally involved. *Orr* v. *Thomas*, 582.

5. Decision in *Succession of Macarty*, 2 An. 979, affirmed. *Ex parte Bujol*, 716.

See CRIMINAL LAW, 1. SUCCESSIONS, 1.

CRIMINAL LAW.

I. *Special Court for Trial of Slaves.*

1. On the trial of a slave before a tribunal assembled under the provisions of the stat. of 1 June, 1846, which requires that it should be composed of two justices of the peace and ten owners of slaves, no objection can be made, after they have been sworn, to the persons empannelled to serve with the justices, on the ground that they are not slave-holders. *State* v. *Isaac*, 359.

2. Where a slave, tried for a capital offence before a tribunal organized under the stat. 1 June, 1846, which provides (sec. 8) that when an offender "shall be convicted of any crime punishable with death, the justices shall sign a sentence to that effect", is found guilty, but one of the justices refuses to sign the sentence, and the tribunal is dissolved without the judgment having been signed, the conviction, being one upon which no sentence could be pronounced in consequence of the dissolution of the tribunal, cannot be pleaded in bar of a subsequent prosecution for the same offence. *Per Curiam:* To sustain a plea of *autrefoits convict* the conviction must be one, which, at the time of pleading it, is susceptible of being followed by a sentence. *Ib.*

3. A justice of the peace who had formed part of a tribunal for the trial of a slave organized under the stat. of 1 June, 1846,

and who had, after hearing evidence, declared his conviction of the guilt of the accused, is not on that account disqualified to sit on a tribunal subsequently organized for a second trial for the same offence. *Ib.*

4. The oath required of members of a tribunal organized, under the statute of 1 June, 1846, for the trial of slaves, cannot be administered by the clerk of a District Court. *Ib.*

5. The fact that there is no judge to preside over the deliberations of the jury of freeholders, on the trial of slaves for criminal offences before the tribunals established by the stat. 1 June, 1846, and the impossibility, in consequence, of presenting to the Supreme Court any question as to the sufficiency of the proof to justify a conviction by a bill of exceptions to the charge of a judge, is a difficulty resulting from the defective organization of the inferior tribunal, which can only be remedied by legislative interference. *State* v. *Nelson*, 497.

6. After conviction of a slave tried for murder before a tribunal organized under the stat. of 1 June, 1846, judgment will not be arrested on the ground that he was not arraigned, and did not plead to the charge, where the record shows that he was defended by counsel, and the court states that he was convicted after an impartial trial. Under the stat. of 1846, objections not relating to the substance of the prosecution cannot be considered on appeal. *State* v. *Jerry*, 497.

7. Where the day fixed for the execution of a sentence of death pronounced against a slave convicted before a tribunal organized under the stat. of 1 June, 1846, passes by, pending an appeal, the Supreme Court have no power to fix another day. *Ib.*

II. *Selling Intoxicating Liquors to Slaves.*

8. One who *sells* spirituous and intoxicating liquor to a slave, will be liable to the penalties imposed by the stat. of 2 April, 1832, though the slave was hired to him at the time. *Aliter*, where the liquor was not *sold*, but *given*. *State* v. *Lyons*, 154.

III. *Bail.*

9. Under sec. 10 of the stat. of 30 May, 1846, and art. 108 of the constitution, one who has taken an appeal from a judgment convicting him of any offence, may be admitted to bail pending the appeal, where the offence charged is one which would have authorized his admission to bail before conviction. The bond to be executed by the prisoner under such circumstance is a bail bond, and not a recognizance or appeal bond. The inferior court is not entirely divested of jurisdiction by granting the appeal, the judge being still authorized to admit the prisoner to bail; and the bail bond should be made returnable before the inferior court, which alone is authorized to order the execution of the final decree on the appeal. Stat. 26 May, 1846, s. 5. *State* v. *Jones*, 10.

10. Where one convicted in a criminal proceeding is admitted to bail pending an appeal, the bond may be executed in the presence of any officer of the court or other person designated by the judge; but the allowing of bail, and the determination of the amount in which the parties are to be bound, are judicial acts, and must be performed by the judge. *Ib.*

11. No judgment can be rendered against the sureties on a bail bond executed by one admitted to bail pending an appeal from a judgment in a criminal proceeding, where the charge stated in the bond is not such as will warrant any criminal prosecution, where it is not shown that the sureties were aware of the charge actually preferred against the accused and of which he was convicted, nor that they consented to become bound for his appearance to answer any other charge than that stated in the bond. *Per Curiam:* If the cause of taking the bond be incorrectly stated the defect cannot, as regards the sureties, be supplied, as in the case of a recognizance, by reference to the indictment. *Ib.*

12. Where a district judge, before whom a prisoner charged with an offence punishable with more than seven years' imprisonment at hard labor, is brought on a writ of *habeas corpus*, admits him to bail, ordering the surety to be judged of and accepted by a justice of the peace named in the order; the surety, when sued on the bond, cannot exonerate himself from liability, on the ground that a justice of the peace could not admit to bail one accused of such an offence. The prisoner was admitted to bail by the district judge, who was authorized to delegate to his clerk or a justice authority to accept the bond. *State* v. *Sewall*, 575.

13. A justice of the peace, before whom a party is brought for examination, cannot admit him to bail, if the crime of which he is accused be "punishable with death, or with seven years, or more, imprisonment at hard labor." Stat. 31 March, 1807, s. 13. This statute is not inconsistent with article 108 of the constitution of 1845, nor with the corresponding article of the constitution of 1812. These articles are silent in relation to the magistrates who shall admit to bail, leaving the subject to the discretion of the legislature. *State* v. *Harper*, 598.

14. A bail bond taken by a justice of the peace in a case in which he is prohibited by law from admitting the party to bail, is void; and the State cannot recover on it. *Ib.*

IV. *Indictment.*

15. Service on the prisoner of a copy of an indictment, unaccompanied with the finding of the grand-jury, is not a compliance with sec. 35 of the stat. of 4 May, 1805, which requires that the prisoner shall have a copy of the entire instrument served on him. *Per Curiam:* The finding of the grand-jury must be endorsed on the bill; the endorsement is a part of the indictment, rendering it a complete accusation against the prisoner. *Ib.*

16. A prisoner does not waive his right, under sec. 35 of stat. 4 May, 1805, to have delivered to him a copy of the indictment and list of jurors two days before his trial, by pleading without claiming it. *Ib.*

17. A caption to an indictment is not required by the laws of this State. *State* v. *Lyons*, 154.

18. It is no objection to an indictment for an offence created by statute, that it does not aver that the accused was not embraced within the terms of the proviso. What comes by way of a proviso in a statute must be urged by way of defence by the accused; otherwise, where the exceptions are in the enacting part of the law, when it must appear in the charge that the accused does not fall within any of them. *Ib.*

V. *Pleas of Auterfoits Acquit or Convict.*

19. One accused of crime can plead a former trial in bar of a prosecution for the same offence, only when it resulted in a verdict either of acquittal or conviction, under such circumstances as would enable him to sustain the plea of *auterfoits acquit* or *auterfoits convict*. Where a verdict is so imperfect and uncertain that no judgment can be rendered on it, the accused must be tried again, either upon the same indictment or on a new bill. *State* v. *Ritchie*, 715.

See *supra*, 2.

VI. *Evidence.*

20. When confessions of guilt are given in evidence, the whole must be taken together; and where a witness, offered to prove a confession by the prisoner, states "that the accused told him that he had killed the deceased, and commenced justifying the act, when witness stopped him," the confession will not be allowed to go to the jury, he having been deprived of the benefit of the explanations with which he intended to accompany it, and which, if made, would have been admissible in evidence. *State* v. *Isaac*, 359.

21. On an information against a party for the violation of the statute against gaming by playing at a particular game, an ordinance of a municipal corporation authorizing the game, and receipts of its treasurer for the price of a license to exhibit the game during the time when the alleged breach of the statute occurred, are inadmissible. But the ordinance, though no such legal justification or excuse as authorized its admission to the jury as evidence, might be received by the judge after verdict, in mitigation of damages. *State* v. *Caldwell*, 435.

22. Such confessions of the accused alone as have been voluntarily made, uninfluenced by either hope or fear, can be given in evidence against him; but they must be shown to have been thus made before they can be received. *State* v. *Nelson*, 497.

23. The fact that the accused was in the stocks at the time that a confession of guilt was made by him, in which he had been placed merely for safekeeping, will not render the confession inadmissible. Where the restraint is such only as is necessary for the safekeeping of the prisoner, it will not render his confession inadmissible. *Ib.*

24. Where a slave in confinement under a charge of murder, on a representation made to him by the overseer of the estate, a son of his master, "that it would be better for him to tell what he had done," confesses the crime, the confession cannot be given in evidence against him. *Per Curiam:* Although opposite opinions have been entertained as to the question, whether a confession made to a person who has no authority over the prisoner, upon an inducement offered by that person, be admissible, it seems to be settled that if the inducement be offered by a master to a servant or by any other person having authority over the prisoner, the confession will not be deemed voluntary, and will be rejected. *Ib.*

25. As a general rule, no evidence is admissible of other felonies committed by the prisoner than that charged in the indictment. But there are exceptions to this rule, one of which is where it becomes material to show the intent with which the act charged was done, when evidence may be given of a distinct offence, not laid in the indictment. Thus, on an indictment under the stat. of 6 March, 1819, s. 2, for "stabbing and thrusting with intent to commit the crime of murder," it devolving on the prosecution to show that the act was done under such circumstances that the offence would be murder if death ensued, malice must be shown; and for that purpose evi-

dence is admissible of an attempt by the prisoner to poison the party stabbed, and this whether the attempt to poison had been declared a crime by statute or not. *State* v. *Patza*, 512.

26. An indictment for *stabbing* is not supported by proof of a *cutting*. *Per Curiam:* The word *stab* imports a wound made with a pointed instrument; the word *cut*, one with an instrument having an edge. *Ib.*

27. Where several persons have entered into the same criminal design, the acts or declarations of one of them, in furtherance of the general object, are admissible in evidence against all the confederates; but where an information is filed against two persons, who are tried together for the same offence, without any evidence to establish a previous combination, the confessions of one prisoner are inadmissible in evidence against the other; they will not be allowed to affect any one but the person who made them. *State* v. *Hogan*, 714.

VII. *Jury and Verdict.*

28. The delivery to the prisoner of a list of persons drawn to serve as jurors, a large portion of whom had been either previously excused from serving, or were not summoned, or were exempted from serving as jurors, and had made know their causes of exemption, though it contain among the rest the names of all the jurors who are to serve on the prisoner's trial, is not a compliance with the letter or spirit of sec. 35 of the stat. of 4 May, 1805. *Per Curiam:* The object of the statute is to enable the accused to enquire into the characters of the jurors by whom he is to be tried, and to prepare his challenges; and a list containing other names than those of the jurors really to be presented on the trial, necessarily tends to embarrass the prisoner in preparing his challenges, and thus defeats the ends of the law. *State* v. *Howell*, 50.

29. Sec. 7 of the stat. 6 April, 1843, authorising juries, in cases in which capital punishment or imprisonment at hard labor for life is inflicted for any crime committed by a slave, to pronounce sentence of death, imprisonment at hard labor for life, or imprisonment for a shorter term, was not repealed by the statute of 1 June, 1846. *State* v. *Lewis*, 398.

30. Jurors cannot be heard as witnesses to impeach their own verdicts. The court must derive its knowledge of the misconduct of the jury, from some other source than the jurors themselves. *State* v. *Caldwell*, 435.

31. Where a special verdict is returned, the jury must find all the circumstances which constitute the offence, to enable the court to render judgment. No defect in the statement by the jury can be supplied by intendment or implication. Thus where the carrying away and disposing of the slave of another constitutes no offence under the statute, unless the owner be thereby deprived of the use and benefit of the slave, and the verdict does not state that the carrying away was without the owner's consent, no judgment can be rendered on it. *State* v. *Ritchie*, 511.

32. A verdict so imperfect and uncertain that no judgment can be rendered on it, does not operate as an acquittal, and, even if the prisoner be discharged, is no bar to another prosecution for the same offence. In such a case a *venire facias de novo* should be awarded. *Ib.*

VIII. *Appeal.*

33. The jurisdiction of the Supreme Court in criminal cases being limited by the constitution, article 62, to questions of law alone, it will not examine into the facts in any such case, for the purpose of determining whether the evidence authorized a conviction. *State* v. *Nelson*, 497.

34. Questions in criminal cases can only be brought before the Supreme Court by a bill of exceptions to the opinion of the judge admitting or rejecting testimony, or to his charge to the jury, or by an assignment of error. *Ib.*

IX. *Forfeited Bonds and Recognizances.*

35. Sec. 4 of the stat. of 1 April, 1835, which provides that "all bonds and recognizances taken by the associate judges, mayor, or recorder, within the city of New Orleans, for the public peace or in criminal matters generally, shall, when forfeited, be recovered by the city attorneys for the use of the corporation of New Orleans," includes among the bonds which are to inure to the benefit of the city, bonds returnable before the District Court as well as those which are returnable before the mayor, associate judges, or recorder. The stat. of 11 March, 1837, ch. 104, indicates no intention on the part of the legislature to change the destination of the proceeds of these bonds, when collected. *State* v. *Harris*, 67.

36. The stat. of 8 March, 1836, dividing the city of New Orleans into three municipalities, did not abolish the old city corporation, nor deprive it of the right of suing for the amount of forfeited bonds and recognizances, directed by sec. 4 of the stat. of 1 April, 1835, to be recovered for its use. *Ib.*

37. Where a judgment has been rendered against one who had executed a bond to

appear and answer a criminal charge, and against his surety, but it does not appear from the judgment, nor any part of the record, that the accused was called upon his bond to answer the charge, nor that the judgment was rendered for the amount of a bond or in consequence of its forfeiture, and no bond was produced on the trial, the judgment must be reversed. A valid judgment could only have been rendered upon the production of a bond in a form which made full proof of itself, or upon proof of its execution. *State* v. *Cooper*, 226.

CURATOR.

See Successions, V.

CURATOR AD HOC.

See Absentee.

DATION EN PAIEMENT.

In a *dation en paiement* every thing doubtful or ambiguous must be interpreted against the donee or creditor. *Groves* v. *Steel*, 280.

DOMICIL.

See Bills of Exchange, etc., 35.

DONATIONS.

I. *Donations Generally.*

1. Under the spanish law one having neither ascendants nor descendants was under no incapacity to dispose of his property by donation in favor of a concubine. By the Code of 1808, book 3, tit. 2, art. 10, persons living in open concubinage were declared incapable of making to each other any universal donation, or under an universal title, *inter vivos* or *mortis causa*. The prohibition to make any donation of immovables, or any donation of moveables exceeding one-tenth part of the whole value of the donor's estate, unless in case of a subsequent marriage, was introduced by the Code of 1825, art. 1468. *Macarty* v. *Mandeville*, 239.

2. The prohibition by law of donations of a particular character implies the right to make those not within the prohibition. *Ib.*

3. A confirmation by the heirs of the donor of a donation void for matters of form, will preclude them from subsequently opposing such vices of form. C. C. 2254. *Deschapelles* v. *Labarre*, 522.

4. The validity of a donation made to a minor child by a third person, cannot be questioned by a creditor of the father of the minor, who has no interest in the property, but simply administers it for his child. The validity of the donation is a matter between the donors and those claiming under them, and the donees. *Snow* v. *Copley*, 610.

5. A donation made to a city of a hospital, which recites that it was made "para que se puedan recoger los leprosos que hay actualmente en gran numero, y el publico goze de este beneficio perpetuamente, a cuyo efecto desde ora para siempre hace donacion en forma, renunciando todo derecho que tenga y pueda tener a dichos edeficios y tierra que lleva bajo de los referidos linderos," is a donation *sub modo*, and not a conditional donation, and the donees may, without forfeiting the donation, apply the property to another object than that contemplated by the donor. *Per Curiam:* There is a material difference between the motives which the donor mentions as being the cause of his liberality, and the conditions he imposes. The failure of a condition annuls the donation, but it remains valid although the motives expressed as the cause of it be untrue. *Pontalba* v. *New Orleans*, 660.

6. A donation made for the erection of an hospital, being a liberality *por obra piadosa*, cannot be revoked for a failure to comply with the charge or condition on which it was made, unless the donor has so provided expressly. *Ib.*

II. *Testaments.*

1. *Form, Effect and Validity.*

7. A legatee of the usufruct of the only immovable property of a succession, though under a particular title, must be considered as an universal legatee of the usufruct, and his obligations in regard to debts to which the immovable is to contribute must be governed by the rules relating to legatees under an universal title; and where property is encumbered by a mortgage created by the testator, even were the devise of the usufruct to be considered a special legacy, the heir would not be bound, in the absence of any express provision in the will to that effect, to discharge the mortgage. C. C. 1631. *Succession of Sinnott*, 175.

8. By the spanish law formerly in force in this State, a testament became void by the subsequent birth of a child. 6 Partida, tit. 1, law 20; tit. 12, law 3. *Hackett* v. *Stephens*, 271.

9. A bequest of land "on the condition that, in case the legatee should die without posterity and without having disposed of

the land, it should belong to a third person," creates a *fideicommissum*, prohibited by art. 1507 of the Civil Code. *Ducloslange* v. *Ross*, 432.

10. Where a testator directs that a sum of money shall be placed in the hands of a certain person to be invested by him in real estate or loaned at interest, as he may deem best, the rent or interest thereupon to be paid monthly to a third person during the life of the latter; and the person by whom the investment was to be made purchases at probate sale of the succession of the testator a large amount of property, giving to the executor in part payment of the price, his receipt for the sum so to be invested; but the purchaser never invests the sum as directed by the will, and some years after makes a *cessio bonorum*, including the property purchased from the succession; on an opposition by the legatee to a tableau presented by the syndics of the insolvent: *Held*, that he has no legal mortgage on the real estate purchased by the insolvent from the succession of the testator, to secure the principal or interest of his legacy; that the legacy has been discharged, so far as the heirs could do it; that art. 1626 of the Civil Code applies only where the heirs refuse to discharge a legacy; that the opponent has only an ordinary claim against the insolvent, for whose acts or omissions the heirs of the testator cannot be made responsible. *Carraby* v. *Creditors*, 491.

11. Where a testator bequeaths a sum of money to A, "for his sole use and benefit, without any security whatever, during his natural life, and at his death to be divided and given equally to the children of S," he must be considered as intending to create an usufruct in favor of A. Such a disposition is within the exception created by art. 1509 of the Civil Code to the prohibition of substitutions and *fideicommissa*. The property in the sum bequeathed does not vest absolutely in A; for though, where the usufruct is of things which cannot be used without being expended or consumed, the usufructuary has a right to dispose of them at his pleasure, under the obligation of replacing them or their value, at the expiration of the usufruct (C. C. 542), as between the parties in interest, the law recognizes him to whom the property is to fall on the termination of the usufruct as the owner, and the usufructuary simply as such. C. C. 543 to 549, 556. Whenever an usufruct is legally established, whether perfect or imperfect according to the provisions of the Code, the prohibition is not violated. *Fisk v. Fisk*, 494.

12. Where the usufruct of a sum of money is bequeathed to a person, "during his natural life, and at his death to be divided and given equally to the children of a third person," such only of the children of the latter as were alive at the testator's death, can take under the testament. C. C. 1457, 1458, 1459, 1469. *Ib.*

13. A testament, disposing of moveables and immovables situated here, made in another State of the Union, by a resident of this State, temporarily absent from home, and who afterwards returned and died at his domicil in this State, if clothed with all the formalities prescribed for the validity of wills in the place where it was executed, will be valid here. C. C. 1588, 1589. Art. 1589 cannot be confined to the cases of foreigners, or of testaments disposing only of moveables; nor is there any inconsistency between it and art. 1581. *Per Curiam:* If a testament contain a substitution or *fideicommissum*, which our law prohibits, we should hold such a disposition null, though it might be valid by the laws of the State where made. But in what relates to the exterior form, not the substance of the testament, nothing in our Code authorizes a distinction between moveables and immovables. *Succession of McCandless*, 579.

14. The third clause of art. 10 of the Civil Code refers, not to the form, but to the substance of a testamentary disposition, permitting the validity of such a disposition of movables to be regulated by the laws of a foreigner's domicil. *Ib.*

15. A nuncupative testament, executed under private signature in the country, in the presence of only four witnesses residing in the place where it was made, is valid, where, from the violence of the disease with which the testator was attacked, and the distance at which other persons competent as witnesses resided, a greater number could not be procured. *Henriette* v. *Duplessis*, 658.

16. Where a testator leaves two wills, provisions in the first contrary to or incompatible with those of the last are considered as having been revoked, and for the purpose of ascertaining any such change of intention, the two wills are to be considered as distinct and as executed at different dates; but the other dispositions must be considered as forming parts of one will. *Succession of Fisk*, 705.

17. Art. 1679 of the Code, which provides that "a testamentary executor to whom the testator has bequeathed any legacies, or other gifts by his will, shall not be entitled to any commission unless the testator has formally expressed the intention that he should have the legacies over and above the commissions," applies where the legacy was made by one will and the appointment of the executor by another, as well as to those cases in which the legacy and appointment were by the same testament. *Ib.*

18. A testator directed that a certain sum of money should be invested in stock, and the interest paid to a legatee during her life, the amount after her death to revert to his estate. The amount was not invested, but one of the executors retained it, and paid the interest to the legatee until her death. The residuary legatee bequeathed this legacy to plaintiffs, who sued the succession of the residuary legatee for the amount of the legacy: *Held*, that the legacy not having been paid to the succession of the residuary legatee, it cannot be made liable for the amount; but, that plaintiffs' remedy is against the party by whom the legacy was retained, and who still holds it. *Dorsett* v. *Lambeth*, 711.

See *suprâ* 1.

2. *Executors.*

19. Where a dative executor has the seizin of the succession, the delivery of a moveable legacy under a particular title must be demanded from him. C. C. 1623, 1664. *Succession of D'Aunoy*, 36.

20. In all personal actions the executor who has the seizin is the legal representative of the succession, and judgments rendered against him are conclusive upon the heirs, where neither fraud nor collusion are alleged nor proved. C. P. 123. *Ib.*

21. Where an executor compromises a claim of the succession without having been authorized by the court, the heirs alone can take advantage of the omission; and it is incumbent on them to do so when they take the seizin of the succession from the executor. *Per Curiam:* They cannot be permitted to receive from him all the property which the compromise had secured to them, and to claim more afterwards on the ground that he had no authority to make it. *Delabigarre* v. *Second Municipality*, 230.

22. Property of a succession offered for sale at a twelve-months' credit under a *fi. fa.*, may be purchased by the executor, for the benefit of the succession, with a view to obtain an extension of time for the payment of the debt, and a twelve-months' bond executed by him for the price will be valid. The effect of the adjudication was not to acquire for the succession property it did not previously possess, nor to change the nature of its title. The heirs alone can complain of the purchase. If they repudiate the act on the ground that the price offered by third persons for the property was adequate, the only consequence will be that they may insist on the executor's taking the property, and accounting to them for the price. *Lafayette* v. *Preston*, 381.

23. Where, subsequently to an act of sale of lands, the parties declare in a separate act that the real consideration of the sale was a debt due by the vendor to the vendee, and stipulate that the vendor shall be allowed to sell any part of the lands the sale of which may be approved by an agent of the creditor, and that the creditor shall reconvey to the debtor any lands that it may not be necessary to sell in order to pay the debt, and the creditor dies: *Held*, that no action will lie against the executors of the deceased to compel them to appoint an agent by whom the sale of lands may be approved; that they have no authority to dispose of the property of the deceased at private sale, such an act not being one of administration; and that the heirs of the deceased are the proper persons with whom to contest the propriety of appointing such an agent. *Delas.us* v. *Roumage*, 510.

24. A contract made by an executor with an attorney for a certain fee as compensation in full for any professional services necessary in the settlement of the succession, whether any action be instituted by or against the succession or not, may be binding between the parties personally, and yet constitute no charge against the succession. If an executor who receives commissions for his services chooses to devolve the whole labor and responsibility of the administration upon an attorney, he must pay for the services rendered by the latter; they constitute no charge against the succession. The succession will be liable only for the value of the professional services actually rendered for its benefit. *Succession of Macarty*, 517.

25. The appointment of a legatee as dative testamentary executor in compliance with the desire of all the other heirs except one who is silent, where the evidence suggests no doubt as to his fidelity, capacity or fitness, will be considered as a proper exercise of the discretion vested in the judge by art. 1671 of the Civil Code. *Succession of Bernard*, 565.

26. One to whom a testator bequeaths the residue of his estate after the payment of a particular legacy, is entitled, as universal legatee, to the possession of the estate of the deceased, where there are no heirs to whom any portion of the testator's property is reserved by law. C. C. 1600, 1602. The only condition which the executor, from whom the seizin is claimed, can impose on the heir is, that the latter shall advance a sum sufficient to pay the moveable legacies. Creditors may claim security for their demands from the heir, previously to his taking possession (stat. 25 March, 1828, s. 15): but the executor cannot require that such security be given. *Succession of Fisk*, 705.

See 17 *suprâ*. JUDGMENT, 5.

DOTAL PROPERTY.

See MARRIAGE, 7, 10, 12.

ERROR.

See EVIDENCE, 41. TRANSACTION, 1.

EVIDENCE.

See CRIMINAL LAW, VI. SLAVE, 1. SUCCESSIONS, 2.

I. *Onus Probandi and Presumption.*

1. Where by a contract of sale of land the validity of the sale was made to depend on the payment by the vendor of certain notes which formed no part of its consideration, the subsequent resumption of possession of the land by the vendor creates such a presumption of payment as makes it incumbent on the vendee to account for the notes. *Downes* v. *Scott*, 278.

2. Where third persons intervene in an action by attachment, basing their claim to the property attached upon a contract of consignment which presupposes the existence of a debt, proof of the debt is essential to entitle them to recover. *Blackly* v. *Matlock*, 366.

3. A slave brought to this State and remaining with the person who brought him until his death, being an immovable in his possession, must be presumed to belong to him. If such a title is to be effected by parol evidence as to its origin in a State in which slaves are considered as personal property, the evidence ought to be definite, positive, and of unquestionable credibility. *Waters* v. *Grayson*, 595.

4. The acts of an officer *de facto*, in actual exercise of the ordinary functions of his office, are valid as to third persons who may be interested in such acts. *Citizens Bank* v. *Bry*, 631.

5. Where the defendant, in an action on a foreign judgment rendered against a person of the same name, denies his identity with the defendant named in the transcript, he must disprove his identity. The proof furnished by the record is *primâ facie* sufficient against him. *Whiting* v. *Ivey*, 649.

6. Where in an action on a note for the price of a slave, defendant alleges that the slave was unsound at the time of the sale, and has since died of the disease with which he was then affected, the burthen is on defendant to show that he took such care of the slave as a prudent father of a family would have done, and that a physician was employed by him to attend to the slave during his sickness. *Davis* v. *Janin*, 712.

See 34 *infrâ*. ATTACHMENT, 8. ATTORNEY AT LAW, 7. BANKRUPT, 1. CORPORATIONS, 8. JUDGMENT, 16, 18, 19. MARRIAGE, 8.

II. *Exceptions to.*

7. Evidence recived in the lower court without exception, cannot be objected to, on appeal, as inadmissible. *Somerville* v. *Young*, 290.

8. Where evidence has been received without objection, it will be too late, at a subsequent stage of the trial, to object to it as inadmissible. *Pickett* v. *Bates*, 627.

III. *Best Evidence.*

9. The production of letters showing that fines had been imposed on a mail-contractor by the post-office department for failures to deliver the mail in time, the department having the right to remit the fines on a proper showing, is not sufficient evidence that the fines have been paid, to authorize a judgment for their amount against a subcontractor through whose fault the fines were incurred. *Riley* v. *Hart*, 184.

10. Parol proof of a fact of which written evidence must exist, as of a mortgage, is inadmissible. *Union Bank* v. *Ellis*, 188.

11. Where an act transferring the rights of a mortgagee and subrogating the purchaser thereto has been lost, proof of its contents can only be received upon showing a previous advertizement of the loss, and that proper measures had been taken to recover it. C. C. 2258, 2259. *Williams* v. *Moraney*, 228.

IV. *Relevancy and Admissibility under Pleadings.*

12. Where, in consequence of the debtor's not having been put in default for the non-performance of his contract, damages cannot be recovered, evidence to prove the amount of damage should be rejected. *Hayden* v. *Hertzinger*, 293.

13. Where a defendant objects to the admission of any evidence on the part of plaintiff until he has elected between two inconsistent causes of action and the objection is sustained, and plaintiff excepts but insists that the case shall go to the jury, and the judge sanctions this irregular proceeding, evidence in support of the contract sued on must be admitted. *Ib.*

14. Where the plaintiff in a petitory action claims the benefit of the possession of his vendors, their declarations may be prov-

ed, on the part of the defence, for the purpose of establishing the character and fact of the possession; and this though one of them was the mother of the defendant. *Davidson* v. *Matthews*, 316.

15. In an action of slander, defendant may offer, in mitigation, the testimony of a witness to establish that, a short time before the institution of suit, the latter heard a third person tell plaintiff that the prosecution should not cost plaintiff any thing; that plaintiff appeared not to wish to sue; and that such third person said to plaintiff, that he intended to break down defendant, by lawsuits or otherwise. The jury might infer from the evidence either that defendant did not consider himself injured, or that he felt conscious of his own culpability and feared an investigation, or that he was drawn into the suit by a third person, as a means of oppressing the defendant. *Douglass* v. *Craig*, 639.

V. *Competency.*

16. In an action against part of the owners of a steamer, who, as commercial partners, were bound *in solido*, on a note given for materials furnished for her equipment, which recites that "the steamer and owners promise to pay, &c.," and was signed by two of the partners who acted as agents for the rest, the latter will not be incompetent as witnesses for the plaintiff on the ground of interest in the event of the suit. *Knight* v. *Lauve*, 64.

17. A grandfather is incompetent as a witness for his grandchild. C. C. 2260. *Succession of Hargis*, 142.

18. A judgment rendered on the confession of a father in favor of his children, is not evidence against third persons. *Per Curiam:* A father cannot be heard as a witness for or against his child. C. C. 2260. *Florance* v. *Bachemin*, 174.

19. On an appeal to a District Court, taken by a land holder from the report of a jury of freeholders appointed to lay out a road, assessing damages for the injury sustained by him in consequence of the opening of the road over his land under a resolution of the police jury of the parish, the president of the police jury, being a mere nominal party, is competent as a witness. Nor can the members of the jury who laid out the road and assessed the damages be excluded, on the ground that, being proprietors of adjoining lands, they were interested in the manner of laying out the road, and, consequently, in the event of the appeal. The objection goes only to their credibility. *Frosard* v. *Police Jury*, 560.

20. A decision, in a civil suit, declaring a witness not entitled to credit, cannot render him thereafter incompetent to testify; though it may greatly affect his credibility. *Farr* v. *Gyles*, 669.

VI. *Examination of Witness.*

21. Where the general character of a witness has not been impeached, but it has only been attempted to do so in reference to particular facts, the party by whom he was introduced cannot sustain his credibility by testimony of general character. *Gilmore* v. *Brenham*, 32.

VII. *Judicial Records and Proceedings.*

22. A statement in the return of a sheriff that "he served copies of the petition and citation on defendants, through S., their agent," is not evidence of the agency; and where there is no allegation in the petition, nor evidence in the record, that the person on whom the service was made was agent of the defendant, plaintiff must be nonsuited. *Jacobs* v. *Sartorius*, 9.

23. A judgment against the principal, though not conclusive against his sureties, is evidence against them until its effect is impugned. *Whitehead* v. *Woolfolk*, 42.

24. The delivery of letters of administration is presumptive evidence that the oath required of an administrator has been taken, and will impose upon one who contests the fact the burthen of proving that the formality has not been complied with. *Brooks* v. *Walker*, 150.

25. The admission in evidence of a record of the proceedings in another action, will not be considered as introducing in evidence the testimony upon which the judgment on those proceedings was rendered. *Florance* v. *Bachemin*, 174.

26. A copy of a record of proceedings in a court of this State, authenticated by the seal of the court, and certified by a deputy clerk, is sufficiently attested. The deputy is an officer known to the law. C. P. 782. *Downes* v. *Tarkington*, 247.

27. In an opposition by one who had been a surety on a custom-house bond, to a tableau of distribution presented by the syndics of the principal, the opponet may show by whom a judgment rendered on the bond had been paid, notwithstanding a statement in the marshal's return that it had been paid by a different person. *Per Curiam:* The statement by the marshal formed no part of the return required by law; and, if it had formed a part, could not take away the right to prove that the opponent had refunded the amount, or a part of it. *West* v. *Creditors*, 529.

28. Letters of curatorship signed by the

judge as parish judge and *ex officio* judge of probates, accompanied by the bond and oath of office received by that officer, and attested by his signature as parish judge, is sufficient evidence of a valid appointment as curator. *Sanders* v. *Dosson*, 587.

29. Where a party intends to avail himself of a judgment as the foundation of his claim, the whole proceedings upon which the decree was based, must be produced. An incomplete transcript will not be admissible. *Brown* v. *King*, 594.

30. A probate judge, by whom the bond of an administratrix was accepted and letters of administration granted, cannot be heard as a witness to prove that, one of the parties by whom the bond was signed executed it on the express condition that other persons, who never signed it, should become co-sureties with him; nor can any other person be received as a witness to establish such a fact. *Taylor* v. *Jones*, 619.

31. Parol evidence is inadmissible to impeach or contradict a record of judicial proceedings. *Ib.*

32. The bond of an administrator received by a probate judge of another State, forms a part of the judicial proceedings relating to the administration of the estate, and is admissible in evidence as a part of a transcript of such proceedings. *Pickett* v. *Bates*, 627.

33. Though a transcript of judicial proceedings in another State shows that a *fi. fa.* was issued against the party, the existence of a judgment will not be inferred. *Ib.*

34. A judgment against a debtor in another State, is *primâ facie* evidence of the debt against a third person to whom the debtor is alleged to have made a fraudulent and simulated sale, in an action against the latter, in this State, to annul the sale for fraud and simulation. It devolves on the purchaser to rebut the evidence. *Ib.*

35. A party cannot recover in an action instituted here on a judgment rendered in another State, unless the transcript shows the foreign proceedings to have been clothed with the forms necessary to a valid judgment in the place where it was rendered. Thus where such a judgment purports to have been rendered by confession, but it is left doubtful whether the confession was made by the attorney, or by the defendant, and there is no writ, citation, declaration, or complaint, which the court was to pronounce upon, or the defendant confess, no effect can be given to the judgment here. *Terrill* v. *Van Bibber*, 634.

36. In an action by one of two makers of a joint and several promissory note, who had paid the whole amount in satisfaction of a judgment thereon obtained against him, to recover from his co-obligor one-half of the amount so paid, a transcript of the record of the action against the former, to which the latter was not a party, is, in the absence of the original note, or of any evidence of its execution or consideration, insufficient to support the action. *Beck* v. *Hunter*, 641.

See 18 *supra*. APPEAL, 27, 39. CESSIO BONORUM, 12. CITATION, 5. EXECUTORY PROCESS, 10, 11. POLICE JURY, 2. SHERIFF, 9. SUCCESSIONS, 5.

VIII. *Non-judicial Records and other Official Instruments.*

37. The enrolment, and accompanying affidavit made by the master of a steamer, are not conclusive evidence that the person stated in them to be the owner of the steamer is really such. *Gilmore* v. *Brenham*, 32.

38. The record of the proceedings of a police jury, though not in the english language, was admissible in evidence while the constitution of 1812 was still in force. *Michel* v. *Police Jury*, 123.

39. A document purporting to be a copy, made in another State from a book called "Miscellaneous Record Book E," certified under the seal of that State, of a deed under seal for certain slaves, appended to which is the oath of the subscribing witness that he witnessed the execution of the instrument, and saw the maker deliver it, where the effect of such record, under the laws of the State in which it was made, is not shown, if objected to, will be inadmissible. The original deed, being under private signature, and presumed to be in the possession of the party unless otherwise accounted for, should have been produced; the copy offered was but the copy of a copy. *Leggo* v. *Canal Bank*, 138.

40. Where a purchaser at a probate sale, who was a party to an action to annul the sale, sets up in his pleading his title as purchaser, claiming a recourse in warranty against the succession in case of eviction, he will not be listened to when, in an action against him by the administrator to recover the property or its value, he avers that he was not the owner of it at the date of the first suit. *Putnam* v. *Davidson*, 266.

41. Where, after the dissolution of the community by the death of one of the spouses, the survivor, as tutrix of a daughter, becomes a party to a marriage contract of the latter, in which it is declared that the daughter is entitled to a certain portion of land belonging to the community, and the daughter subsequently mortgages that portion of the land to a third person, referring in the act to the land as that described in the marriage contract, the surviving wife will be estopped from questioning the title of the daughter to that portion of the land. *Per Curiam*:

Even if she made an unintentional mistake as to the quantity, her innocence will not protect her, for the rule is that, where one of two innocent persons must suffer, he shall suffer who by his act occasioned the confidence and loss. *Frosten* v. *Legendre*, 400.

42. Though an act of sale *sous seing privé*, which had been recorded in the office of the parish judge, do not show upon its face that it was either acknowledged or proved before its registry, the certificate of the notary that the act was of record in his office, is such *primâ facie* evidence that it was legally inscribed as will relieve the party offering it from the necessity of showing upon what proof it was registered. *Oglesby* v. *Drake*, 640.

See Executory Process, 9.

IX. *Private Writings.*

43. A receipt executed by a wife, assisted by her husband, acknowledging the receipt by the husband of the proceeds of paraphernal property, is, *primâ facie*, sufficient against the heirs of the husband; but where the succession of the latter is insolvent, the evidence adduced by the wife, in opposition to creditors, must be conclusive. *Succession of Hargis*, 142.

44. A statement made in an account rendered by an agent, not under oath, there being no evidence to bring the account within the rule which permits the declaration of a witness to be given in evidence against the principal as part of the *res gestæ*, is inadmissible in evidence. *Hebert* v. *Woods*, 254.

X. *Parol Evidence as affecting Written Instruments, and Proof of Fraud.*

45. Parol evidence is inadmissible, between the parties or their representatives, to prove a sale, evidenced by a notarial act, to have been simulated. A counter-letter, or other written evidence equivalent thereto, is the only proof of simulation admissible under such circumstances. C. C. 2256. *Dabadie* v. *Poydras*, 153.

46. The rule established by art. 2256 of the Civil Code, prohibiting the admission of parol testimony to contradict or enlarge valid written acts, will not exclude such evidence when adduced to identify land sold, where the titles contain no specific description of the property. Such evidence explains and elucidates the title, but goes neither against nor beyond it. *Moore* v. *Hampton*, 193.

47. The true cause of a contract may be shown by any legal evidence, oral or written, and the evidence adduced for that purpose never can be considered as contradicting the act. C. C. 1888, 1894. *Delabigarre* v. *Second Municipality*, 230.

48. A statement made by a party is inadmissible to explain or contradict a notarial act made by his authority, where he continues to hold the property conveyed to him by the act. *Groves* v. *Steel*, 280.

49. Parol evidence is inadmissible to prove an agency for the purchase of real estate. *Seaton* v. *Sharkey*, 332.

50. Though a written contract may be necessary to establish a partnership in the ownership of slaves as between the partners themselves (C. C. 2807), parol evidence will be admissible in favor of a third person charging a partnership interest, and a fraud committed by one of the partners for the benefit of his associates. *Stewart* v. *Sowles*, 464.

51. A purchaser who sues to rescind the sale of a slave on the ground of fraud, will not be estopped by the written act of sale, made in the name of one party alone, from showing the interest of other parties. *Ib.*

52. Parol evidence is admissible to prove that a written act of compromise, by which the creditor released a portion of his claim, was made in consequence of fraudulent representations by the debtor. C. C. 3046. The introduction of such evidence is not prohibited by art. 2256 of the Civil Code; it does not tend to vary or contradict the written act, but to show that there never was any valid compromise, it wanting the essential element of consent. *Jamison* v. *Ludlow*, 492.

53. The rule established by art. 2256 of the Civil Code, which prohibits the introduction of parol evidence to vary or contradict the terms of a written act, is not infringed by the admission of such evidence to prove a new and distinct agreement to pay a debt released by the written act. *Ib.*

54. Where a written act of sale is unambiguous, and, by its legal effect, confers the vendor's privilege, parol evidence is inadmissible to establish that the parties intended that no such privilege should exist. C. C. 2256. *Boner* v. *Mahle*, 600.

XI. *Proof of Agreement to Pay Interest.*

55. An agreement to pay interest must be established by written evidence. C. C. 2895. Parol evidence is inadmissible for such a purpose. *Forgay* v. *Hamlin*, 697.

XII. *Evidence of Parties.*

56. Where written interrogatories have been propounded to a witness to be examined under a commission, and cross interrogatories have been added by the opposite party, the examination must be restricted to them, unless with the consent of both parties. Stat. 25 March, 1828, ss. 7, 9. *Slagg* v. *Pomroy*, 16.

57. A party may interrogate his adversary in relation to the character of a witness; but such questions only can be put to him as could be propounded to a witness, in whose place the party interrogaed must be considered as standing. *Gilmore* v. *Brenham*, 32.

58. A party to a suit will not be required to answer interrogatories, where the application to propound them was made after the case had been called for trial, and the party proposed to be interrogated was absent. *Brooks* v. *Walker*, 150.

59. Either party to an action has a right to require the answers of his adversary under oath to interrogatories to be used as evidence upon the trial of all issues pending between them, whether on preliminary exceptions or on the merits. C. P. 347. *McGehee* v. *Brown*, 272.

60. A party to an action to whom an interrogatory is propounded by his adversary, may state in his answer any matter pertinent to the issue, and clearly connected with the facts which his adversary is seeking to establish. The answer may be qualified by the statement of facts which would prevent the consequences of an absolute and unqualified answer. *Haynes* v. *Heard*, 648.

61. Where, in an action on a note which is silent as to the rate of interest, a party, for the purpose of recovering a higher rate of interest than would be due on a note made in this State, interrogates his adversary as to whether the note was not executed by him in another State, the latter may mention in his answer, after denying that the note was made by him in the State indicated, that the consideration for which the note was given had failed, or that no consideration ever existed. *Per Curiam:* The purpose of the interrogatory being to subject defendant to liability for a higher rate of interest, a fact going to repel that liability, by invalidating the contract, is within the fair scope of the rule. *Ib.*

62. Where a party, who has propounded interrogatories to his adversary, does not choose to use them, the latter may avail himself of them. Nor can this right be defeated by the plaintiff's abandoning his suit, before trial, and without having used the interrogatories. Where, after such an abandonment, the plaintiff institutes a second action for the same cause, defendant may offer in evidence his answers to the interrogatories propounded in the first case. *Whiting* v. *Ivey*, 649.

63. A manifest evasion by a party to answer interrogatories propounded to him, when he could not mistake their import, creates a violent presumption that a true and direct answer would have destroyed his claim or defence. *Ib.*

XIII. *In Actions on Bills of Exchange and Promissory Notes.*

See BILLS OF EXCHANGE, ETC., 17, 23, 33 to 41.

EXECUTION OF JUDGMENT.

1. Where, subsequently to a seizure under a *fi. fa.* and advertizement of the property for sale at the court-house of the parish, the court-house is removed, under the provisions of a special law, to another place, the advertizement which had been posted up at the old court-house should be removed to the new, and the sale be made at the latter. C. P. 664. Stat. 5 March, 1842. After the new seat of justice was selected, and a court-house provided there, it became the only place at which sales under execution could be legally made. *Union Bank* v. *Smith*, 147.

2. An order of execution must be in english and french, where the latter is the maternal tongue of the debtor, or it may be enjoined. C. P. 626. The fact that the petition in the action, which was in english only, was not excepted to on that account, is not a waiver of the right to require that the order of execution shall be in both languages. *Dubroca* v. *Favrot*, 272.

3. A judgment creditor is not bound to resort to a revocatory action before seizing property, which he believes to belong to his debtor, and to be held by a third person under a simulated sale. *Clark* v. *State Bank*, 325.

4. Where a judgment for a principal sum, with interest at ten per cent a year, was rendered before the stat. of 19 February, 1844, reducing the rate of conventional interest to eight per cent, a twelve months' bond given for the price of property sold under a *fi. fa.* issued on the judgment, though executed after the passage of that act, might lawfully contain a stipulation for interest at ten per cent. *Per Curiam:* The judgment creditor had a vested right to interest at that rate until paid. *Bemiss* v. *Dwight*, 337.

5. The proceedings authorized by sec. 13 of the stat. of 29 March, 1839, which provides that where a plaintiff has applied for a *fi. fa.* and has reason to believe that a third person has property, or effects in his possession, or under his control, belonging to the defendant, or is indebted to him, he may cause such third person to be cited to answer, under oath, interrogatories touching said property or debt, may be resorted to in all cases where a *fi. fa.* has been issued; and as a *fi. fa.* may issue from the court of the parish in which the judgment was rendered to any other in the State where the debtor has property (C. P. 642), the right of propounding interrogatories to third persons is accessory to and accompanies the writ to the parish in which it

is to be executed, giving to the court of that parish jurisdiction over the proceedings against such third persons under the *fi. fa.* *Featherstonh'* v. *Compton*, 380.

6. A garnishee, or third person, to whom interrogatories are propounded under a *fi. fa.* under the statute of 20 March, 1839, sec. 13, and 18 March, 1840, cannot interfere in the controversy between the original parties, nor plead other defences than those necessary to protect himself. He will be protected by the judgment of the court against him, as no seizure in his hands can be made under the execution without notice to the defendant, who must, after notice, oppose the seizure, or lose all recourse against the garnishee for the payment made by him under the order of a competent court. But a judgment and *fi. fa.* are necessary to support the proceedings against such garnishee or third person, and they may require proof of their existence as a pre-requisite to any judgment against them. *Ib.*

7. A judgment is not satisfied, nor novated, by the taking of a twelve-months' bond for the price of property sold under a *fi. fa.* *Lafayette* v. *Preston*, 381.

8. A sale under execution of promissory notes, made without appraisement, is void. C. P. 671 to 680. *Stockton* v. *Stanbrough*, 390.

9. A sale of promissory notes belonging to a debtor, made under a *fi. fa.*, without their having been taken possession of by the marshal, is void. *Ib.*

10. The defendants in the action are the only parties who can take advantage of any inaccuracy in setting forth the title of the case in a *fi. fa.*, issued under a judgment; and their rights, in this respect, will be considered as waived, where they subsequently insist on a sale under the seizure and appraisement. *Conrey* v. *Copland*, 452.

11. Where, after the appraisement of property seized under a *fi. fa.*, it is discovered that no adjudication can be made on the day for which the sale is advertized, it being a day of public rest, and the sheriff makes a second seizure of the property, advertizing it anew, no new appraisement can be made, where the defendants in execution insist on the sale being made under the first appraisement. *Ib.*

12. The sole object of the notice required to be given to a defendant in execution to appoint an appraiser, is to give him an opportunity to make an appointment. If he have done so, it is idle to enquire whether he had notice or not. *Foster* v. *Roussel*, 546.

13. The proceedings authorized by sec. 13 of the stat. of 20 March, 1839, against third persons under a *fi. fa.*, cannot be substituted for a direct revocatory action, and be used to assail, on the ground of fraud, the title of such third person to property in his possession. *Copley* v. *Dosson*, 651.

14. Interrogatories propounded to a third person under section 13 of the stat. of 20 March, 1839, though not answered on the day on which the party was cited to appear, cannot be taken for confessed without an order of court. Until such an order has been made the person interrogated may appear and answer them, and plead any defence he could have previously offered. *Ib.*

15. Where a plaintiff in execution receives from a sheriff the proceeds of property sold by him under a *fi. fa.* without making any objection or reservation of any kind, he will be held to have ratified the sale, and cannot afterwards complain of the manner in which it was made. *Coleman* v. *Dewees*, 698.

See Appeal, 15. Corporations, 7. Partnership, 3, 4, 6. Privilege, 9. Sale, 35. Sheriff, 7, 8, 9.

EXECUTOR.

See Donations, 19 to 27.

EXECUTORY PROCESS.

1. Where an order of seizure and sale is enjoined, and the creditor answers the petition for an injunction, praying for a judgment against the plaintiff in injunction for the debt due him, with mortgage, the only effect of the prayer will be to change the proceedings from the *viâ executivâ* to the *viâ ordinariâ*. The change involves no abandonment of the action, but merely authorizes a judgment to be rendered affecting the debtor's property with a general mortgage. *Brooks* v. *Walker*, 150.

2. Where an order of seizure and sale is enjoined, and the proceedings are changed from executory to ordinary by the answer of the creditor, both parties being before the court and issue joined between them, the plaintiff in injunction cannot object to the proceedings *viâ ordinariâ* on the ground of want of service of citation and petition. *Ib.*

3. Where mortgaged property is in possession of the mortgagor, one expressly subrogated to the rights of the mortgagee, may proceed against it *viâ executivâ*. But where an act of mortgage contains no clause *de non alienando*, and the property is sold by the mortgagor to a third person, neither the mortgagee, nor any one subrogated to his rights, can proceed against it by order of seizure and sale. The creditor must resort

to an hypothecary action. *Williams* v. *Morancy*, 227.

4. Where an order of seizure and sale, sued out under article 746 of the Code of Practice, on a judgment rendered in another State, was suspended by appeal at the time of the passage of the stat. of 1 June, 1846, repealing so much of that article as authorizes executory process on such a judgment, the proceedings must be dismissed. Laws regulating the form of judicial proceedings relate to the remedy; and where, before a final decision, a new law changes the form, it must take effect at once, unless it expressly declares that the pre-existing form shall continue to be followed in cases then pending. *Scott* v. *Duke*, 253. *Commercial Bank* v. *Markham*, 698.

5. Want of amicable demand, is not a sufficient ground to enjoin the execution of an order of seizure and sale. *Snow* v. *Trotter*, 268.

6. In proceedings *viâ executivâ*, it is not necessary that a copy of the petition should be so served on the defendant. C. P. 734, 735. *Ib.*

7. A prayer that mortgaged property should be seized and sold to satisfy plaintiff's demand, is equivalent to a prayer for the recognition of the mortgage. *Ib.*

8. Where a mortgage contains the pact *de non alienando*, it is unnecessary to allege in the petition for an an order of seizure and sale that, the property mortgaged is in the possession of the mortgagor. *Ib.*

9. Where an act of mortgage given to secure the price of land, recognizes the capacity of the agent by whom the sale was made and the mortgage retained, and recites the mandate, the power of attorney itself forms no part of the testimony necessary to authorize an order of seizure and sale. *Ib.*

10. Where it appears by any evidence that property has been appropriated by judicial authority for the satisfaction of a foreign judgment, the judgment could not have been rendered executory here, even before the stat. 1 June, 1846, without showing what disposition had been made of the property; it being impossible to say, without such evidence, what amount, if any, is due on the judgment. *Ward* v. *Agricultural Bank*, 450.

11. A *procès-verbal* of an adjudication for the price of which the purchaser executed his notes with mortgage, though not in the form of a notarial act, being a matter of judicial record, is authentic evidence, such as may form the basis of an order of seizure and sale. Nor is it important that it was not signed by the judge as judge of probates; his signature as parish judge was sufficient. As parish judge, he was probate judge and auctioneer, and clothed with authority to adjudicate the property. *Sanders* v. *Dosson*, 587.

12. An order of seizure and sale, issued prior to the statute of 1 June, 1846, on a judgment rendered in another State, cannot be proceeded with since the promulgation of that statute. A rule taken subsequently to the statute on a garnishee to show cause why certain notes should not be delivered to the sheriff to be subjected to plaintiff's execution, must, consequently, be discharged. *Kilgore* v. *Planters Bank*, 693.

13. The stat. of 1 June, 1846, which declares: "That so much of articles 746 and 747 of the Code of Practice as authorizes a creditor having obtained a judgment in another State of the Union or in a foreign country, to proceed by executory process on said judgment, be, and the same is hereby, repealed," does not violate art. 119 of the constitution, which provides that, "no law shall be revived or amended by reference to its title; but in such case the act revised, or section amended, shall be re-enacted and published at length." *Per Curiam:* Art. 119 does not include, by its terms, the repeal of laws, or portions of them, and can only be thus extended by an implication of doubtful propriety. *Commercial Bank* v. *Markham*, 698.

FAMILY MEETING.

See TUTORSHIP.

FIDEICOMMISSUM.

See DONATIONS, 9, 11, 13.

FRAUD.

See EVIDENCE, 45, 50, 51, 52. PRESCRIPTION, 8, 9.

HUSBAND AND WIFE.

See MARRIAGE.

HYPOTHECARY ACTION.

1. One who purchases slaves subject to the condition that they shall be emancipated in a certain time, and who subsequently emancipates them under a decree of court rendered in due form, cannot afterwards be sued in an hypothecary action as a third

possessor of the slaves, by the holders of a judgment which had been registered while the slaves were in the possession of their original owner. *Per Curiam:* The defendant is not a third possessor, nor can he be treated as the real emancipator. The slaves hold their actual *status* under a decree of court, which will be binding until overruled in a direct action against them and the judgment debtor. *Taylor* v. *Rostrop*, 100.

2. The owner of an undivided third interest in certain real estate, having mortgaged it to plaintiff, by an act duly recorded, subsequently sold his third to the owner of the other two thirds. A creditor of the latter, who subsequently obtained a judgment against him, seized the whole property under execution, and sold it for a price less than the mortgage upon the one-third, and the whole price was paid to the judgment creditor. The first mortgagee was not a party to these proceedings. In an action by him against the purchaser as third possessor: *Held*, that plaintiff's mortgage-rights are protected by arts. 683, 684 of the Code of Practice; and that, under art. 709, he is entitled to an hypothecary action against the purchaser at the judicial sale, as a third possessor who has taken subject to the mortgage. *De Blanc* v. *Dumartrait*, 542.

See Executory Process, 3.

IMPUTATION OF PAYMENT.

See Payment, 3, 5, 6.

INDICTMENT.

See Criminal Law, IV.

INJUNCTION.

1. To authorize a debtor to enjoin an execution on the ground of his being the holder of notes and drafts due by the plaintiff in execution, it must be shown that they were acquired at such a time that they could not have been pleaded in defence to the original action. *Morgan* v. *Driggs*, 124.

2. Where an execution, issued for the amount of a judgment rendered by the Supreme Court and for the costs, is enjoined by the debtor, proof that the costs in the Supreme Court had been paid by the debtor before execution was issued, but unaccompanied with any allegation that the creditor was aware of the payment, will not subject the latter to the costs of the injunction; nor will the fact deprive him of the right to damages, under the statute of 25 March, 1831, s. 3, upon the amount enjoined, which was really due. *Ib.*

3. To authorize a judgment, on the dissolution of an injunction, condemning the plaintiff in injunction and his surety to pay, *in solido*, the amount of the judgment enjoined, there must be proof that the creditor had lost the amount of his judgment in consequence of the injunction. *Segond* v. *Remy*, 126.

4. The execution of a judgment cannot be enjoined on the grounds which have been pleaded in defence to the original action. *Barrow* v. *Wright*, 130.

5. Where a defendant in injunction prays for its dissolution, and that the principal and C. M., his surety, be condemned, *in solido*, to pay interest and damages, and it appears from the bond that J. J., and not C. M., was surety on it, judgment may be rendered against the party really bound as surety. Under sec. 3 of the stat. of 25 March, 1831, it was sufficient to show who was the real surety on the bond, to authorise a judgment against him. *Union Bank* v. *Smith*, 147.

6. A bankrupt who has failed to plead his discharge under the act of Congress of 19 August, 1841, in defence to an action against him, cannot avail himself of it as a means of arresting, by injunction, the execution of the judgment against him. *Palmer* v. *Moore*, 208.

7. An affidavit by a party that "the facts and allegations stated and set forth in the foregoing petition, which according to his belief render an injunction necessary, are true to the best of his knowledge and belief," is insufficient to sustain an injunction. *Canal Bank* v. *Carriel*, 225.

8. An affidavit for an injunction, in these words: "M. J. (the petitioner,) being duly sworn deposes, *that facts* stated in the foregoing petition are true to the best of his knowledge and belief," is insufficient, for uncertainty. C. P. 304. The party will not be permitted to amend by inserting the article *the* before *facts*, the sense being complete without it, where nothing shows the omission to have been one of inadvertence, nor that the party intended to swear to all the facts stated in his petition, nor to any specific fact. *Judson* v. *Connolly*, 466.

9. Sec. 3 of the stat. of 25 March, 1831, authorizing the court, in case of the dissolution of an injunction, to condemn, in the same judgment, the plaintiff and his surety, jointly and severally, to pay to the defendant interest on the amount of the judgment and damages, applies only where judgments have been enjoined. In other cases, the defendant must be left to his

remedy on the bond. *Jacobs* v. *Augustin*, 476.

10. An affidavit at the foot of a petition for an injunction in these words, "that facts and allegations contained in the foregoing petition are true," is insufficient, no specific fact, rendering an injunction necessary, being sworn to. *Carroll* v. *Miller*, 555.

11. The sale of property seized under a *fi. fa.* cannot be enjoined by the defendant in execution, on the ground that it does not belong to him, but to others; it is for the latter to resist the execution, if they desire to do so. If the property was in possession of defendant as agent for the owners, or as administrator of the succession of any one of them, he might have instituted proceedings, in their names, for their protection. *Mitchell* v. *Lay*, 593.

12. Where a surety signs an injunction bond in blank, which is afterwards properly filled up, his liability will attach from the time of his signature. *Eyssallenne* v. *Citizens Bank*, 663.

See Appeal, 7, 11. Injunction. 4.

INSOLVENCY.

See Cessio Bonorum. Judgment, 4.

INSURANCE.

1. Where in an action on a policy of insurance on merchandize on board of a barge which was sunk while in tow of a steamer, the evidence shows that the barge was strong and in good condition, and that it was possible that her sinking may have been owing to some unseen and undiscovered peril of the river, it would be to extend the doctrine of seaworthiness too far, to avoid the policy because the cause of the accident is not specifically ascertained by the evidence. *Snethen* v. *Memphis Insurance Company*, 474.

2. The general rule is, that seaworthiness is presumed; but where a vessel springs a leak soon after the risk commences, without any apparent cause from perils within the policy, a new presumption arises of unseaworthiness; but this latter presumption is not conclusive; it may be rebutted by evidence. *Ib.*

3. Where a vessel insured "at and from N. to H., from thence to B. and back to N," is lost while in the port of H., the loss is covered by the policy. The insurance is the same as if the policy had been "at and from N. to B. with liberty to stop at the intermediate port of H. The words "*thence*" and "*from*" when applied to intermediate ports have not the same exclusive sense as when used with regard to the commencement of a voyage; they are merely descriptive of the course of the voyage. Under policies "*from*" a port, instead of "*at and from*," the risk attaches only from the time of sailing: but though "*at*" is used, when it is intended to include the insurance in port at the commencement of the voyage, it is not usual to insert it in relation to intermediate ports, to cover the risk while there. *Bradley* v. *Nashville Insurance Co.*, 708.

4. Where an insurance company was bound, in good faith, to furnish a policy in the usual form and with the usual clauses, they will not be allowed to release themselves from any liability to the insured from their neglect to do so. *Ib.*

5. In the construction of policies of insurance the intent is to be regarded, rather than the grammatical construction. *Ib.*

INTEREST.

See Evidence, 55, 61. Cessio Bonorum, 2. Execution of Judgment, 4. Judgment, 9. Loan. Marriage, 17. Obligations, 12, 17, 18, 23, 28. Successions, 4, 11, 17. Surety, 12. Tutorship, 13, 14.

INTERROGATORIES ON FACTS AND ARTICLES.

See Evidence, 12.

INTERROGATORIES UNDER A FI. FA.

See Execution of Judgment, 5, 6, 13, 14.

INTERVENTION.

See Pleading, III.

JUDGMENT.

See Cessio Bonorum, 1.

I. *Form.*

1. A judgment rendered on a rule taken on a sheriff, to show cause why he should not be declared liable as surety, on account of his neglect to take the surety required by the court on releasing sequestered property, if not signed by the judge cannot have the force of *res judicata*. C. P. 546. *Gates* v. *Bell*, 62.

2. The stat. of 10 April, 1805, having required that all judgments should be signed, a judgment rendered while that statute was in force, not signed, cannot have the force of *res judicata*. *Hatch* v. *Arnault*, 482.

II. *Effect.*

3. Decrees rendered by consent of parties, decide nothing; they merely authenticate private agreements, and render them executory between the parties. Their effect as to third persons, is that of a transaction made in an authentic form. *Union Bank* v. *Marin*, 34.

4. A decree rendered by consent in a proceeding which a father and his children are parties, by which a mortgage is created on the property of the former, after an execution issued against him at the suit of a third person had been returned "*nulla bona*," and his insolvency at the time thereby ascertained, cannot affect the rights of the creditor. *Ib.*

5. Where the matters at issue in an opposition by the heirs of the wife to an account presented by the surviving husband as executor, are the right of the heirs to a certain interest in a plantation and slaves alleged to be community property, and the simulation of a sale of the property made by the husband before the dissolution of the community, the judgment rendered thereon may be pleaded as *res judicata* to an action by the heirs against the husband personally for a partition of the same property alleged to be owned by themselves and the defendant, and for a judgment recognizing their rights to an undivided portion of it and declaring the simulation of the sale made by the husband. The fact that the proceedings on the opposition were against the defendant as executor, and that the opposition was to his account as such, will not prevent the judgment from being set up as *res judicata*, on the ground that the demands in the two cases were not made by the parties in the same quality. *Per Curiam*: The law giving a preference in the administration of successions to those who are interested in them, it generally happens that the administrator, either as heir or creditor, has an interest adverse to that which he represents. His individual interest is litigated in the account which he presents, and on which his claim, as heir or creditor, is exhibited; in the eye of the law he is personally a party, though his personal rights have been asserted in his representative capacity; and if one having an adverse interest make an issue on the claim, any judgment rendered on it will be binding on both parties. *Morton* v. *Packwood*, 167.

6. The only test as to the effect of a decree as *res judicata* is its *finality* as to the matters embraced in it, and its having the requisites prescribed by art. 2265 of the Civil Code. *Kellam* v. *Rippey*, 202.

7. To support the exception *rei judicatæ* the issue in the two actions, as well as the parties, must be the same. Successors, or *ayans-cause* of the parties to the original suit, are considered as having been parties themselves, where their titles have been acquired since the institution of the action in which the original judgment was rendered; *aliter*, if acquired before. *Delabigarre* v. *Second Municipality*, 230.

8. One who purchases property, or acquires a mortgage on it, pending a litigation in relation to it, though for a valuable consideration, and without any express or implied notice in point of fact, will be bound by any decision that may be made against the person from whom he acquired his title or mortgage. *Gillespie* v. *Cammack*, 249.

9. As a general rule a judgment in an action for interest, particularly when evidenced by a distinct obligation, will not have the force of *res judicata* between the same parties, in a subsequent suit for the principal, or other arrears of interest. But if in a suit for interest the validity of the original contract is adjudicated upon, the judgment will be conclusive between the same parties. Where, however, a case goes off on some matter of form, or some technical defect, it is obvious that the fact itself negatives the idea that the causes of action or defence are the same, or that the adjudication was on the contract; and a case so terminated does not form *res judicata* in another suit in which the original cause of action is in controversy. *State Bank* v. *Navigation Co.*, 294.

10. Where a judgment has been obtained on a note, the note itself becomes merged in the judgment, and can only be severed from it by the reversal or recision of the judgment. *Smalley* v. *Creditors*, 386.

11. Where a final judgment has been rendered against a plaintiff, in an action on a bill of exchange, on a plea of prescription, the judgment will be conclusive against him in a subsequent action on an account current, the balance in which results from the non-payment of the bill. The cause of action being the same in both suits, plaintiff cannot, by merely changing the form of his pleadings, avoid the consequences of the first judgment. *Johnson* v. *Forstall*, 446.

12. Where the demand in one case is made by a party in his own right, and in another as executor, the demand not being between the same parties in the same capacity, a judgment in the first case cannot have the force of *res judicata* in the second. *West* v. *Creditors*, 529.

13. The exception *rei juicatæ* is *stricti*

juris; and if there should be any doubt as to the identity of the things claimed, or of the persons claiming them, it cannot be maintained. *Ib.*

14. Where there is doubt upon a question of *res judicata*, the party against whom the plea is set up should have the benefit of that doubt. *West* v. *Creditors—Rehearing*, 532.

15. A judgment homologating a tableau of distribution presented by the syndic of an insolvent, and declaring that it shall stand "as the final tableau of distribution of the funds in the hands of the syndic," on which a creditor, who opposed the homologation, was placed as an ordinary creditor, cannot be pleaded as *res judicata* to an opposition by the same creditor, to a second tableau, for the distribution of other funds, on which he claimed to be placed as a privileged creditor for the same debt. The homologation has the force of *res judicata* only as to the funds proposed to be distributed by the first tableau. *Ib.*

16. The presumption which attaches to the thing adjudged is *juris et de jure*, and no evidence is admissible against it. *Orr* v. *Thomas*, 582.

17. Where, in an action against one who had executed a mortgage on land to secure his faithful administration as curator of a succession, and who had left the State indebted to the succession for moneys received by him in his official capacity, a curator *ad hoc* is appointed to represent the absentee, and a judgment is rendered against him for the amount due, and the mortgage recognized and rendered executory, the judgment must be restricted to the property mortgaged. It has not the force of a personal judgment, rendered after citation; nor, on being recorded, can it have the force of a judicial mortgage on property held by a third person, under a conveyance from the debtor anterior to the judgment. *George* v. *Le Grand*, 652.

See Cessio Bonorum, 11. Successions, 3.

III. *Action to Annul.*

18. A judgment of interdiction, executed nearly thirty years previously in the presence of the party interested, and of his wife and relations, without any kind of opposition, and under which property has been purchased by third persons in good faith, will not be annulled because no record evidence of citation or of the appearance of the party is to be found in the office where it should have been preserved. *Per Curiam:* In consequence of the notorious want of care in the preservation of the public records in the country parishes, the absence of such record evidence, when applied to ancient proceedings, raises but a remote presumption, and one which must be held subordinate to the violent legal presumption that, the judge before whom the proceedings were had did his duty. *Gentile* v. *Foley*, 146.

19. After twenty years, there is a presumption in favor of every judicial tribunal, acting within its jurisdiction, that all persons concerned had due notice of its proceedings. *Ib.*

20. The right to annul a judgment is not restricted to the cases specially enumerated by art. 607 of the Code of Practice. But to entitle a party to such relief, a case must be made out showing that it would be against good conscience to execute the judgment, and that the plaintiff could not have availed himself of the matter in the former litigation, or was prevented by fraud or accident from so doing. If there has been *laches* or negligence, the party cannot be relieved. The matter must be such as the defenant could not, by reasonable diligence, have known. *Norris* v. *Fristoe*, 646.

IV. *Judgment as in case of Non-Suit.*

21. Where an action has been pending for more than three years, and plaintiffs have had ample time to procure the testimony necessary to establish the demand, but have not done so; and, on the motion for a new trial, it was not urged that there was surprize, or any expectation of obtaining further evidence, a final judgment, and not one of non-suit, will be rendered in favor of defendant. *New Orleans and Carrollton Railroad Company* v. *Chaney*, 262.

22. Where a plaintiff, in an action in which there is no reconventional demand, fails to appear on the day fixed for the trial, either in person or by attorney, to prosecute his suit, no final judgment can be rendered against him; the judgment should be one of non-suit. C. P. 491, 532, 536. *McDonogh* v. *Dutillet*, 660.

JURY.

1. A court may assess damages without the intervention of a jury. Art. 313 of the Code of Practice relates to the assessment of damages under judgments by default. *Daly* v. *Van Benthuysen*, 69.

2. A prayer for a jury is too late, after the case has been called for trial. C. P. 494, 495. *Brooks* v. *Walker*, 1[illegible].

3. A prayer for a trial by jury is in time, if made before the case is set for trial. C. P. 494, 495. *Wilson* v. *State Bank*, 196.

4. Under the 17th sec. of the stat. of 10 February, 1841, a prayer for a jury should

be disregarded until the jury fee is paid; but the payment may be made at any time before the case is fixed for trial. *Ib.*

5. Where a case is tried before a jury who write only french, and the verdict is returned by them in that language, and it is translated into english under the direction of the court, read to them as translated, assented to by them, signed by the foreman, and recorded by the clerk in their presence, it will be sufficient. *Walsh* v. *Barrow*, 265.

6. A plaintiff cannot require that an exception to the jurisdiction of the court, on the ground of the defendant's domicil being in another parish than that in which the action is pending, should be submitted to a jury. *McGehee* v. *Brown*, 272.

See APPEAL, 38. CRIMINAL LAW, VII.

LAW.

1. Section 7 of the act of the Mississippi legislature of 21 February, 1840, which declares, that it shall not be lawful for any bank in that State to transfer, by endorsement or otherwise, any note, bill receivable, or other evidence of debt, was intended solely for the benefit of the debtors of those banks; and the privilege which it conferred on them, of paying the banks in their own notes, might be waived by the debtors. The transfer of the notes does not place a party claiming under it, in the position of one to whom courts can give no assistance in enforcing his contract, as in case of a plaintiff seeking to enforce an immoral or unlawful contract. *Roberts* v. *Stark*, 71.

2. Though a statute direct a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards. *Wilson* v. *State Bank*, 196.

3. The laws organizing the government of a city are eminently laws for the preservation of public order, from the force and obligations of which individuals cannot derogate by their conventions. C. C. 11. Contracts made in violation of such laws are absolute nullities, not susceptible of ratification. *State Bank* v. *Navigation Company*, 294.

4. Prior laws will not be presumed to have been repealed by subsequent laws, from the mere fact that the latter contain provisions different from the former. A repeal will be implied only where the last statute contains provisions contrary to, or irreconcileable with, those of prior laws. C. C. 23. *State* v. *Lewis*, 398.

5. Those statutes are *real*, in contradistinction to *personal*, which regulate directly property, without reference to the condition or the capacity of its possessors. *Augusta Insurance Co.* v. *Morton*, 417.

See MARRIAGE, 2, 3.

LEASE.

I. *Of Things.*

1. A stipulation that a lessee shall not sub-let the premises without the written assent of the lessor, is for the exclusive benefit of the latter, and if he does not take advantage of it, no one else can. *Montecon* v. *Faures*, 43.

2. Where a lease of land has not been recorded in the manner required by law for absolute sales of real estate, the lease will be without effect as to purchasers from the lessor. Stat. 26 March, 1806, s. 1. *Brown* v. *Matthews*, 198.

See PRIVILEGE, 15.

II. *Of Labor.*

3. In an action by a contractor, against the party with whom he had contracted for the erection of a building, for damages for non-performance on the part of the latter, the difference between the amount the contractor was to receive, and that which he was to pay under sub-contracts made by him for the materials and building, does not constitute the amount of profit the contractor is entitled to recover. *Per Curiam:* It cannot be ascertained, without evidence as to the value of labor and materials at the time, and as to the solvency of the sub-contractors, whether they would have been able to comply with their obligations, or to indemnify the contractor if they had not. When a contract is broken before the arrival of the time for full performance, and the opposite party sues for damages also before the time for full performance, the market value at the time of the breach, whenever there is a market value, is to govern. Where there is none, as in this case, the question involves a minute enquiry into the cost of materials, the expense of procuring and transporting them to the place of delivery, the amount of labor required for putting up the building and the value of the wages of laborers and mechanics, the whole to be assessed at the time of the breach of the contract; and wherever the estimate of profits must be somewhat conjectural, the damages should be moderated so as to allow for any partial uncertainty that may exist. *Seaton* v. *Second Municipality*, 44. *McCord* v. *West Feliciana Railroad Co.*, 285.

4. Where, in consequence of the failure to give to the owner of a plantation the

notice required by the police regulations of the parish, of the work to be done in making a road and levée on his plantation, the contractor to whom the work was adjudicated cannot proceed summarily to seize and sell the land, he may recover from the police jury the amount due under his contract. *Michel* v. *Police Jury*, 123.

5. A contract made by a partnership, as undertakers for the construction of a railroad, will be cancelled by the death of any of the parties, unless the other party consent that the work shall be continued by the heirs of the deceased, or by others employed by them for that purpose. C. C. 2737. A refusal to give such consent will not subject the party refusing to damages. He is only bound to pay to the heirs the value of the work already done, and that of the materials already prepared, proportionably to the price agreed on, in case such work and materials may be useful to him. C. C. 2738. *McCord* v. *West Feliciana Railroad Co.*, 285.

6. Where one who had contracted to erect certain buildings, becomes insolvent, leaving the buildings incomplete, and an instalment of the price, payable on their completion, unpaid, nothing in the stat. of 18 March, 1844, requires that the owner, in order to entitle himself to apply the unpaid balance to their completion, should have an estimate of the work remaining to be done made by any disinterested persons. However expedient such a course may be, it is not required by the statute. Whatever has been necessarily expended in the completion of the buildings, must be deducted from the unpaid instalment. The provision for a submission to arbitration in sec. 3, of that stat. contemplates only disputes between the contractor and those employed by him, or who have furnished him with materials. *Hale* v. *Wills*, 504.

7. By the stat. of 18 March, 1844, relative to mechanics and laborers employed by builders, and the furnishers of materials, these persons, as against the owner, hold under, and not beyond, the building contract. *Ib.*

8. An account, presented by a furnisher of materials used in the construction of a building, to the owner, in order that the latter may retain its amount out of subsequent payments, under the provisions of the stat. of 18 March, 1844, which states the quantity of the materials furnished, the dates of the delivery, the prices, and that they were delivered to the contractor to be used in the buildings, and is certified by a justice of the peace to have been sworn to before him, is sufficient under the statute. *Ib.*

9. Under the stat. of 18 March, 1844, mechanics and laborers employed by a builder, and those who have furnished him with materials, who have complied with the provisions of that stat. by presenting attested accounts to the owner, are entitled to any amount, not exceeding their claims, unpaid under the contract at the time of the notice, after subtracting the amount necessary to complete the buildings; but the owner cannot be made liable beyond the amount of his contract; nor will he be liable by reason of any payment made to the contractors in advance, where the amount so advanced would have become due before the date of the notification to the owner of the claim of the laborer or furnisher of materials. *Ib.*

10. As to the rights of the laborers and furnishers of materials *inter se*, they must share the fund *pro rata*; they do not rank in the order of time, and any such creditor for labor or materials has a right to participate in the fund until distributed. *Ib.*

LESION.

See PRESCRIPTION, 9.

LITIGIOUS RIGHT.

See OBLIGATIONS, 9, 10. PLEADING, 17.

LOAN.

1. The provision of article 2895 of the Civil Code, establishing the rate of conventional interest, has always been confined to loans of money, and held not to apply to the purchase and sale of promissory notes, bills of exchange or other negotiable instruments, nor of credits. *Bank of Louisiana* v. *Briscoe*, 157.

2. An exchange of credits made *bonâ fide*, is not illegal; *aliter*, if the exchange be a mere device to cover usury. In every case the inquiry is, whether the transaction was, in substance, a loan of money; if really a sale or exchange of credits, it will be valid though the contract be in the form of a loan. *Ib.*

MANDAMUS.

Decision in *Succession of Macarty*, 2 An. 979, affirmed. *Ex parte Bujol*, 716.

MANDATE.

1. Where cotton seized under execution, by consent of parties is shipped by the sher-

iff to factors residing in another parish for sale, and the latter accept the consigment with knowledge of the capacity in which the sheriff held the property, they cannot refuse to pay over the proceeds on the ground of a claim for supplies furnished to the plantation on which the cotton was produced; nor can they question the sheriff's authority to send the property beyond his bailiwick. Any privilege for supplies claimed by them must be asserted before the court under whose process the sheriff holds the cotton. In such a case compensation cannot take place, the parties not being indebted to each other. C. C. 2203. *Jones* v. *Fellowes*, 47.

2. An express authority is necessary to authorize an agent to bind his principal, by a contract of suretyship, for a stranger. *Gates* v. *Bell*, 62.

3. A shipment of specie made by a factor to his principal, without any letter of advice or other notice of the consignment, cannot be viewed as made with proper care, and with that attention to the interests of the principal which the factor is bound to bestow; and, if lost or stolen before reaching the principal, the loss, as between the principal and factor, must be borne by the latter. *Smith* v. *Ward*, 76.

4. Defendant purchased, with two other persons, certain ground for the purpose of dividing it into lots and reselling it, taking the title in his own name, and giving a counter-letter binding himself to sell and account to his co-proprietors. One of the latter executed his notes, which were endorsed by the defendant and discounted, and the proceeds applied on account of the maker towards paying his portion of the price of the land. The defendant was afterwards obliged as endorser to pay the notes. The maker having died, defendant and his surviving co-proprietor agreed with the executors of the deceased that the whole property should be sold by the register of wills, and at the sale defendant became the purchaser. The executor having demanded from the purchaser the whole price of an undived third, alleging that purchasers at probate sales cannot compensate against the price claims due them by the deceased, and that for his advances defendant was only an ordinary creditor of the succession, which was insolvent: *Held*, that defendant had the right to retain any advances made by him out of the proceeds of the property in his hands. C. C. 2992. *Blanchard* v. *Lockett*, 98.

5. Where an agent fails to ship goods, which he was directed by his principal to do, the latter is entitled to recover the actual value of the goods at the port of destination. *Ryder* v. *Thayer*, 140.

6. It is not true, as a legal proposition, that for every act for which an agent may expend money for his principal, he can bind him in a contract of suretyship. The expenditure of money, and the loaning of the credit of the principal, are not governed by the same rules. The power of the agent, as to the former, may be implied and incidental; as to the latter it must be express, or necessarily implied from the nature of the mandate; the former is a necessary function of administration, the latter is not within its limits. *State Bank* v. *Navigation Co.*, 294.

7. Mere knowledge that there is a principal will not destroy the right of a party dealing with an agent, and charging him with the balance due on the transaction, to look to the principal when afterwards discovered, where the state of the accounts between the principal and agent is not such as to make it a hardship that the former should be held liable. *Ballister* v. *Hamilton*, 401.

8. The obligation of an agent, whose authority is limited by instructions, is, to adhere faithfully to those instructions. If he unnecessarily exceed his commission, or risk the effects of his principal without authority, he renders himself responsible to the latter for the consequences of his act. If loss ensue it is no defence that he intended the benefit of his principal. But subsequent assent, as between principal and agent, is equivalent to a previous authority; hence where an agent has committed a breach of orders, and the principal, with full knowledge of all the circumstances, adopts his acts, even for a moment, he will be bound by them, and the agent discharged. Such assent need not be express; it may be inferred from the conduct of the principal. *Ward* v. *Warfield*, 468.

9. Where a principal has employed a factor either to buy or to sell, and the factor, acting in good faith, has departed from his instructions, and has so informed his principal, the latter will be bound to notify his agent of his repudiation of the act, within a reasonable time after being informed of it, or he will be presumed to have adopted the transaction, and the loss, if any, will fall on him. *Ib.*

10. Where a factor, to whom cotton had been consigned for sale in the city in which he resided, in consequence of low prices, ships it to a foreign market, and notifies his principal of the fact and of his motive for doing so, offering to him the alternative of taking the cotton at a valuation placed on it before shipping, or the chances of the foreign market; and the latter, instead of replying at once, postpones his answer for several days, until, after the receipt of for-

eign news, he had ascertaind that the shipment would prove unprofitable, when he notified the factor of his intention to take the price of the home valuation, the principal will be held to have assented to the shipment, and the loss will fall upon him. *Ib.*

11. Where the master of a vessel employs a broker to procure freight, and the latter introduces to the master a party having merchandize to ship, which the master declines to take on the terms offered; but, a few days after, while the broker is still employed to procure a freight for him on better terms, concludes, through another broker, a bargain with the same party on the terms first proposed, and pays him his brokerage, he will be bound to pay a brokerage to the first broker. *Per Curiam:* To enable the defendant, under such circumstances, to defeat the broker's claim for commissions, by taking the idential offer, through another broker or directly by himself, would enable him to commit a fraud upon the plaintiff. *Jenkins* v. *Trott*, 671.

See ATTACHMENT, 1. BILLS OF EXCHNGE, &c. 3. EVIDENCE, 44, 49. PRESCRIPTION, VII. PRIVILEGE, 5, 6, 10.

MARRIAGE.

I. *Personal Relations of Spouses.*

1. A due bill executed by a married woman, without the authorization of her husband, will not be binding on her, where the consideration for which it was given is not shown to have enured to her benefit. *Perry* v. *Thompson*, 188.

2. Art. 2412 of the Civil Code, which provides that the wife cannot bind herself for the debts of her husband, according to the doctrine of the civilians, is a *personal* statute. It is founded exclusively on the personal relations between husband and wife, and is confined in its operation to married persons within our jurisdiction. The disability to contract, which it establishes, exists only in a certain contingency, that of the debts' not inuring to her benefit, and that contingency is strictly personal. *Augusta Insurance Company* v. *Morton*, 417.

3. The incapacity of a married woman to contract is of the same character as that of a minor, and the laws creating the incapacity of the latter have always been classed among *personal* statutes. *Ib.*

4. Where a married woman domiciliated in another State, to secure a debt of her husband, mortgages, by an act executed at her domicil, real estate in this State forming part of her separate property, the act, if valid in point of form, and authorized by the laws of her domicil, will be enforced here. *Per Curiam:* Such an act conflicts with no law of this State, and no reason of comity would authorize a court here to relieve the wife from its effect. It interferes with no *real* statute, and the *personal* statute does not reach it; the person not being subject to our jurisdiction. *Ib.*

5. Decision in *Adle* v. *Anty*, 1 An. Rep. 260, affirmed. *Lovelace* v. *Cuny*, 619.

6. Decision in *Bank of Louisiana* v. *Farrar*, 1 An. 49, affirmed and extended to contracts with the Citizens' Bank. *Eyssallenne* v. *Citizens' Bank*, 653.

7. The charters of banks in this State which authorize married women to bind themselves jointly and *in solido* with their husbands, in any hypothecary contracts or obligations entered into by the husband with those banks, place dotal and paraphernal property on the same footing. *Ib.*

See PRESCRIPTION, 2.

II. *Property of Spouses.*

8. The separate creditors of a husband, when alleging neither fraud nor simulation, can exercise no greater rights than he could; and they are bound to show, as he would be, in a contest with his children, which of the effects existing at the death of his wife were brought into marriage by him, or acquired during its continuance by donation or inheritance. C. C. 2374. *Union Bank* v. *Marin*, 34.

9. Where a wife dies without issue, leaving a succession valued at $26,000, and the only property of the husband, who was twenty-six years old and healthy, but without any profession or calling, consists of two slaves of the value of $1,100, the property will be considered as inadequate to his support, and that fact will entitle him to claim, under art. 2359 of the Civil Code, one-fourth of the succession of his wife. *Per Curiam:* The object of the law, is to provide for the support of the survivor out of the property of the deceased, without reference to his ability to support himself by his personal industry; and the only question that can arise is, as to the sufficiency of the pecuniary means of the husband for his support. *Succession of Fortier*, 104.

10. The settlement of dowry must be shown by the marriage contract. *Succession of Hargis*, 142.

11. A surviving wife can only exonerate herself from personal liability for one-half of the debts of the community of acquets and gains, by an express renunciation. The community cannot be accepted with benefit of inventory. C. C. 2378, 2379, 2382. *Monget* v. *Pate*, 269.

12. A surviving wife can claim to be sup-

plied with mourning apparel at the expense of the succession, only where there has been a constitution of dowry. Art. 2353 of the Civil Code applies only to such cases. *Succession of Holbert*, 436.

13. Sec. 2 of the stat. of 25 March, 1844, confers on the surviving spouse, where the deceased has not disposed by testament of his or her share in the community, the usufruct of the share of the community property inherited by the issue of the marriage, so long as the survivor shall not contract a second marriage. The share consists of the residue after payment of the debts. The statute does not confer on the survivor the usufruct of the share regardless of debts; nor does it impair the rights, either of the creditors or heirs, to insist on the prompt payment of the community debts. *Succession of Fitzwilliams*, 489.

14. The usufruct created by sec. 2 of the stat. of 25 March, 1844, must be governed by the rules prescribed by the Civil Code on the subject of usufruct; and by these rules either the creditors or the heirs may claim that property subject to the usufruct be sold to an amount sufficient to pay the debts, unless the usufructuary prefer to advance the sums necessary for that purpose. The survivor can preserve the property unsold only by paying or assuming the debts, thereby releasing the heirs from interest; in which case he will be entitled to all the fruits produced by the property, they being deemed equivalent to the interest on the sums advanced (C. C. 578, 579); and, in his settlement with the heirs, he must be ranked as a creditor for the amount of those debts, without interest, and held not accountable for the revenues received during the existence of the usufruct. *Ib.*

15. Where a surviving spouse, entitled to the usufruct of the share of the community property inherited by the issue of the marriage, is treated in the settlement with the heirs as an usufructuary of the whole share of the community property who has advanced the sums necessary to discharge the debts, he can claim no remuneration, in his settlement with the heirs, for services rendered while administering the property for his own exclusive use. *Ib.*

16. A wife has a tacit mortgage on the immovables of her husband for the reimbursement of paraphernal effects alienated by him; and this mortgage is not required to be registered to give it effect against third persons. *Succession of Mouton*, 561.

17. Where after the dissolution of the community by the death of the wife, the husband neglects to cause any partition to be made, and subsequently administers the common property, he will be liable for one-half of the nett revenues of the community property from the date of the dissolution of the marriage. Sums due on contracts bear interest from judicial demand though unliquidated; but, in case like the present, where the judgment includes the revenues to the date of the decree, interest can only be allowed from that date, and not from judicial demand. *Petrie* v. *Wofford*, 562.

18. After the dissolution of the community by the death of the wife, the surviving husband can only sell his interest of one-half in a slave belonging to the community. *Ib.*

19. Where a wife sues her husband for a separation of property, and restitution of her separate estate, commencing her proceedings by attachment, and judgment is rendered in favor of the husband, the community of property and and conjugal relations being left in their integrity, no action can be maintained by the husband against the surety on the attachment bond, for damages. *Le Blanc* v. *Guidry*, 564.

20. The husband, as head and master of the matrimonial community, may dispose of its moveables even by a gratuitous title, for the benefit of any person. *Glenn* v. *Elam*, 611.

21. The revenues of the separate estate of the husband form a part of the community; and where debts due by the husband before marriage have been paid by him during the community out of revenues arising from his separate estate, as he had a right to do, his separate estate will be responsible to the community, after its dissolution, for the amount of the debts so paid. C. C. 2372. 2377. *Ib.*

22. To entitle a surviving wife to claim from the succession of her husband the marital fourth under art. 2359 of the Civil Code, she must prove that her husband died rich, and that she was left by his death in necessitous circumstances. A wife who had abandoned her husband for several years before his death to live in concubinage with another, cannot be said to have been left by him in necessitous circumstances within the meaning of that article. *Armstrong* v. *Steeber*, 713.

See Evidence, 43. Pleading, 19. 20. Prescription, 28, 29. Sale, 34.

MINOR.

See Tutorship.

MORTGAGE.

1. A general mortgage resulting from the recording of a judgment, does not operate upon slaves, after their emancipation, unless there was fraud on the part of the emancipator. C. C. 190. *Taylor* v. *Rostrop*, 100.

2. Where a mortgage was executed to secure the price of bank-stock subscribed for by the mortgagor under the provisions of a bank charter, which declared that each stockholder should be entitled on certain conditions to a loan to the amount of one-half of his stock, the mortgage stipulating that the mortgaged property shall stand hypothecated for any stock-loan so to be made, it will not be declared void on the ground of its not being in compliance with art. 3277 of the Civil Code, which requires that the exact sum for which the mortgage is given shall be stated in the act. *Citizens' Bank* v. *Nicolas*, 112. *Eyssallenne* v. *Citizens' Bank*, 663.

3. A mortgage on slaves, recorded in the mortgage-office of the place where the debtor had his domicil at the time of the inscription, will be unaffected by his subsequent removal with the slaves to another parish, and the acquisition of a domicil there. No inscription is necessary in the parish of his new domicil. *Crouch* v. *Lockett*, 121. *Bibb* v. *Union Bank*, 334.

4. Where a mortgagee transfers to different persons portions of the mortgage debt, they will be entitled to payment, *pro rata*, out of the property mortgaged; no preference results from any difference in the dates of the transfers. *Adams* v. *Lear*, 144.

5. The effect of a deed of trust executed in another State, conveying land situated in this State, and recorded in the parish in which the land lies, must be determined by our laws. C. C. 10. Such an instrument being an agreement by which mortgaged property is authorized to be sold extra-judicially, is not valid under our laws so far as third persons are concerned, whatever may be the effect between the parties. *Ricks* v. *Goodrich*, 212.

6. Under the roman law, a power to a mortgagee to sell without judicial authority would have been valid, and a sale, after public advertizements and notice to debtors, made under the forms required, would have given a good title to a *bonâ fide* purchaser; but with our hypothecary system the validity of such a power would be incompatible. *Ib.*

7. Where a register of mortgages is shown to have kept but one book for inscription of conventional and judicial mortgages, the fact that a judicial mortgage was not recorded in a separate volume of judicial mortgages will not be allowed to prejudice the judgment creditor. *Per Curiam:* As there was but one book kept, third persons could not be misled. *Gillespie* v. *Cammack*, 248.

8. A mortgage executed to secure the payment of a judgment stated in it to be the property of the mortgagee, will be declared void on proof that the judgment did not belong to him, *Freeland* v. *Briscoe*, 225.

9. The recording of an act of mortgage or pledge in the office of the register of conveyances in the city of New Orleans, is not notice to third persons. C. C. 3318, 3319, 3125. *Succession of Argote etc.—Re-hearing*, 478.

10. As between the vendor and vendee, it is unimportant whether a mortgage given to secure the price be recorded or not. Any objection on account of its not having been recorded, could only be raised by a third possessor. *Sanders* v. *Dosson*, 587.

11. Decision in *Union Bank* v. *Guice*, 2 An. R. 249, as to mortgages, affirmed. *Eyssallenne* v. *Citizens' Bank*, 663.

See BANK, 1. DONATIONS, 10. JUDGMENT, 17. MARRIAGE, 4, 6, 7, 16. PRESCRIPTION, 12, 36. SUCCESSIONS, 24. TUTORSHIP, 1.

NEW ORLEANS.

1. The late police jury of the parish of Orleans was authorized by law to impose taxes to meet the disbursements it was required to make. The stat. of 7 April, 1824, is conclusive on the subject. The power of the police jury in this respect was unaffected by the stat. of 8 March, 1836, dividing the city of New Orleans into municipalities. *New Orleans* v. *Lockett*, 99.

2. The existing municipalities of New Orleans, have not all the powers which belonged to the municipalities of New Orleans under the french government of Louisiana, nor those of the *Cabildo* under that of Spain. Since the legislation in our Codes on the subject of corporations, the express delegation in the act of 17 February, 1805, organizing the city government, the radical change in our political system by the transfer of Louisiana from the French Republic to the United States, the repeal of the laws of Spain in 1828, and our own settled jurisprudence in relation to the political corporations of the State, it is useless to look for the powers of the municipalities elsewhere than in our Code, legislation and jurisprudence. *State Bank* v. *Navigation Company*, 294.

3. Sec. 13 of the statute of 17 February, 1805, incorporating the city of New Orleans, which provides that "the estates, whether real or personal, the rights, dues, debts, claims, or property, which heretofore belonged to the city, or were held for its use by the Cabildo under the spanish government, the municipality after the transfer to France, or the municipality now existing, shall be vested in the mayor, aldermen, and inhabitants," relates to rights of property

and privileges incidental thereto, and not to the powers of the corporation. Sec. 14 of that stat. which declares that, "all the legal ordinances of the present municipality, not incompatible with this charter, which shall be in force on the second monday in March next, shall remain in force until repealed or altered by the said mayor, or city council; and all the powers at present vested in the mayor and municipality of the said city, shall continue to be vested in them until the said second monday in March next," relates to the political powers of the corporation, which, after the day fixed for their termination, were superceded by the corporation organized under the charter. *Ib.*

4. The stat. of 17 February, 1805, incorporating the city of New Orleans, confers, in general terms, powers of administration, and, by its varioun special delegations of authority, excludes the idea of any other power being granted than such as the police, and preservation of good order among the population, require. *Ib.*

5. The word *canals*, in the 16th sec. of the stat. of 17 February, 1805, authorizing the "mayor and city council of New Orleans, to cause common sewers, drains, canals, pavements, and bridges, to be built and constructed in every part of the city," means canals for draining, and not for navigation. *Ib.*

6. The ordinances of the council of the First Municipality of New Orleans, of 29th July and 5th August, 1836, authorizing the mayor to endorse and guaranty, in the name of the municipality, certain bonds of the Orleans Navigation Company, exceed the powers of those entrusted with the administration of the affairs of the municipality, and the endorsements made in pursuance thereof are not binding on the municipality. The objects for which the endorsements were given—the improvement of the navigation of the canal and bayou St. John, and the improvement of the commerce in the part of the municipality in which the canal terminates, were objects for which the municipal administration had no authority to loan its credit. *Ib.*

7. The stat. of 18 March, 1839, ch. 40, relative to the city of New Orleans, expressly provides (sec. 6) that none of its provisons shall effect any loans or bonds made by any of the municipalities of that city, leaving their validity as before the passage of that act. *Ib.*

8. The ordinance of the council of the Second Municipality of New Orleans of 12 March, 1839, authorizing the treasurer of the municipality to employ persons to collect taxes, etc., and providing a compensation therefor in the form of commissions, authorized such commissions to be charged only on collections made by persons employed by the treasurer. The ordinance did not contemplate the allowance of such commissions to the treasurer, as an addition to his salary. *Turner* v. *Second Municipality*, 315.

See CRIMINAL LAW, 35, 36.

NEW TRIAL.

1. Where a new trial has been granted to a party to enable him to establish a fact by the evidence of a certain witness, and this witness is not produced on the second trial, nor his absence accounted for, no other trial will be granted to the same party, to enable him to prove the same fact, though applied for on the ground of newly discovered evidence, and supported by an affidavit of the applicant, in which a different witness is named as one by whom the fact is expected to be proved. Due diligence was not used to procure the evidence. *Valega* v. *Broussard*, 145.

2. The objection that one who sues as an administrator is not a resident of the State, made for the first time on a motion for a new trial, comes too late. *Brooks* v. *Walker*, 150.

NOTARY.

A notary may demand payment of a note by deputy. Stat. 4 March, 1844. *Bank of Louisiana* v. *Lawless*, 129.

See BILLS OF EXCHANGE, &c., 29, 30, 39.

NOVATION.

See EXECUTION OF JUDGMENT, 7.

NULLITY.

See SALE, 30, 34, 35. OBLIGATIONS, 8, 9. PRESCRIPTION, 10, 11, 21.

OBLIGATIONS.

I. *Capacity to Contract.*

1. The disability resulting from the conditions of persons is personal; and contracts valid at the place of the domicil are valid without reference to the situation of the property, so far as the capacity of the party to contract is concerned. *Augusta Insurance Co.* v. *Morton*, 417.

2. The incapacities created by arts. 1139, 1784, of the Civil Code, endure as long as the relations between the parties from which they result, but no longer. If the contract by which a curator, administrator, &c. acquires the property previously committed to his charge necessarily terminates the previously existing relation between him and his vendor, it may be voidable on other grounds, but it does not come within the prohibition of arts. 1139, 1784. Thus the sale by an heir to the executor of his hereditary rights, necessarily implies a deliberate intention that the relation should cease, so far as his rights are concerned. *Ross* v. *Ross*, 533.

II. *Joint and Several.*

3. An agreement by which it is stipulated that each of the parties shall hold an undivided seventh of certain property to be purchased in the name of one of them, and shall pay each his portion of the price, is not a joint obligation, and, in an action on it, all the parties need not be joined. Each party promises separately for himself to do a distinct thing. C. C. 2073, 2075. *Fuselier* v. *Lacour*, 162.

III. *Object.*

4. Improvements made upon the public lands of the United States, where the party making them is not in a situation to avail himself of the pre-emption laws, cannot form the object of a contract. Arts. 1885, 1886 of the Civil Code limit the rule contained in art. 1960, that no one ought to be permitted to enrich himself at the expense of another, to cases in which the alleged benefit arises from a lawful act. From unlawful acts, though they may have proved beneficial to others, no rights not expressly authorized by law can arise. *Jenkins* v. *Gibson*, 203.

5. To constitute legal fraud, in case of a preference given by an insolvent to one creditor over another, so as to affect the preferred creditor, it must appear that the creditor, as well as the debtor, was not in good faith, that he knew of the insolvency of the debtor, and contemplated the securing to himself of an advantage over the other creditors. *Gillespie* v. *Cammack*, 248.

6. Although a debt be released on payment of a part, there remains such a natural obligation on the part of the debtor to pay the balance, as will preclude him from recovering back the amount when paid after the release, and will form a sufficient consideration for a new promise. *Jamison* v. *Ludlow*, 492.

7. Plaintiff, a resident of Illinois, who had bound himself to defendant to settle a judgment, obtained against a partnership of which they had been the members, wrote to defendant in New Orleans, that their creditor had consented to compromise his claim by taking a certain sum as payment in full, stating his willingness to pay one-half of that sum but his inability to do more, and advising defendant to contribute the balance in order to relieve himself from the debt. On the 26th of September, defendant wrote to plaintiff that he would pay one-fourth of the sum for the purpose of settling the debt, as soon as the judgment should be entered as satisfied on the records of the court by which it was pronounced. Negotiations with the creditor were terminated, and the judgment was cancelled, on the 10th of November, and this suit commenced on the 1st August following. *Held*, that the proposition made by defendant being beneficial to plaintiff, his assent may be inferred (C. C. 1796, 1798, 1805), and that the former not having required an immediate reply, plaintiff's answer was within a reasonable time; and that notice of plaintiff's assent, though not given to defendant until the institution of suit, the latter having sustained no injury in consequence, is sufficient. The proposal in defendant's letter cannot be considered void for want of consideration. *Ryder* v. *Frost*, 523.

8. The nullity established by art. 1784 of the Civil Code is relative only, and introduced exclusively in the interest of the owners of the property, of which that article forbids the sale. *Ross* v. *Ross*, 533.

9. Where, pending an action by a mortgagee against the heirs of a mortgagor, who had accepted his succession, to enforce his claim against the mortgaged property and against the heirs personally, an attorney, who had appeared for the defendants, purchases a portion of the mortgaged property, the purchase will be a nullity as to the mortgagee. C. C. 2422, 2623. So far as the freedom from the mortgage, resulting from prescription or peremption, is concerned, the right purchased was a litigious one. The naked title not being in litigation, the purchase of it was not illegal. *Consolidated Association* v. *Comeau*, 552.

10. Where the plaintiff's right in an action on a draft is purchased, pending the litigation, by a third person, the defendant may claim to be released on paying the price of the transfer, with interest from its date. C. C. 2622, 2623. *Farrell* v. *Austin*, 626.

See Bankrupt, 1. Cessio Bonorum, 6. Law, 3.

IV. *Stipulation in favor of Third Persons.*

11. Where, by a contract entered into in the State of Mississippi between the agent of a factor residing in this State and a party living in the former, the agent binds his principal to apply the proceeds of cotton, delivered to him in that State to be sold here, to the payment of certain debts due to third persons, the rights of the parties must be determined according to the law of Mississippi; and by that law the debtor is considered as having stripped himself of all authority as owner, the legal title to the property being vested, for the purposes of the agreement, in the factor, and an equitable title in the creditors for whose benefit the stipulations were made; no previous assent of the latter being necessary to prevent other creditors from acquiring an adverse lien by execution or attachment, the stipulations being beneficial to them, and their acceptance therefore presumed. The trust thus created in favor of the creditors could not be destroyed either by the debtor, or the factor to whom the property was delivered. And where in such a case the property is attached by a creditor of the original owner, the attachment will be sustained only upon proof that the parties for whose benefit the stipulations were made had notice thereof, and declined to avail themselves of them. *Oliver* v. *Lake*, 78.

V. *Interpretation.*

12. The liability of the parties to a contract, made in another State by an agent of the owners of a steamer residing here, for supplies for the use of the boat, the payment for which was to be made here, must be governed, in whatever relates to the construction and the nature and validity of the engagement, by the law of the place where the contract was made. The stipulation as to the place of payment concerns the performance of the contract, which must be according to the law of the place where it is to take place. And where, in such a case, there is no stipulation as to the rate of interest in case of non-performance, the law of the place of payment must govern in allowing interest *ex mora* from judicial demand. *Bent* v. *Lauve*, 88.

13. Where the facts of a case present a double aspect, one of which represents a contract which the law authorizes, and the other one prohibited by law, the contract must be sustained. *Bank of Louisiana* v. *Briscoe*, 157. *Macarty* v. *Mandeville*, 239. *Fisk* v. *Fisk*, 494.

14. Where, under an ordinance of the police jury, an inspector of roads and levées of the parish adjudicates to a party the construction of a levée for a certain sum, and the adjudication contains no stipulation that the contractor shall look to the land, or to its owner, for payment, and it is not shown that such was the understanding of the parties, the parish will be bound for the price of its construction. C. C. 1952. *Crowley* v. *Concordia*, 224.

15. The nature of a contract depends entirely on the obligations it imports; its form is subordinate to its real character. *State Bank* v. *Navigation Co.*, 294.

16. A contract must be understood in that sense in which it will have some effect, rather than in that in which it can have none. *Moraney* v. *Dumesnil*, 363.

17. Where the agreement between the parties to a contract is silent as to the rate of interest to be paid on any balance that may be due, the rate must be that allowed by the laws of the place where such balance was payable. *Ballister* v. *Hamilton*, 401.

18. Where an advance is obtained in this State, from an agent residing here, of a foreign principal, on merchandize to be shipped to and sold by the latter abroad, the allowance of interest on any balance due to the foreign principal in consequence of the proceeds of the sale falling short of the advances, must be determined by the law of the domicil of the principal, where the merchandize was sold. *Ib.*

19. Where a female child, a slave, was sold, while the Code of 1808 was in force, by a written instrument, reciting that the vendor, "in consideration of a solemn promise made to him by the purchaser to manumit and set free the said female slave and of a certain sum (the amount of which is stated in the act), bargains, sells and delivers the slave to the purchaser with full power and authority to manumit her," the sale will be considered to have been made to insure her emancipation. The emancipation was an essential condition without which the sale would not have been made, and was to be regulated by considerations of the slave's own welfare, and the laws of the State. She did not become free on attaining the age of thirty years; but her right to have her condition adjudicated upon, and her emancipation and that of her children ordered, so far as her owner was concerned, unless there was some lawful impediment, then became complete. Moreau & Carleton's Partidas, part. 3, tit. 11, law 8. C. C. 185, 174. C. P. 103. *Angelina* v. *Whitehead*, 356.

20. An interpretation of contracts based upon presumed ignorance of the law by the parties, is inadmissible. *Boner* v. *Mahlé*, 600.

VI. *Default and Damages.*

21. Plaintiff having sold bills of exchange on a foreign country to defendant, delivered to the latter, at the same time, bills of lading for certain property, under an agreement that they were to be held as security for the *acceptance* only of the bills of exchange, and were to be delivered to the consignee on his acceptance. The latter tendered an acceptance of the bills of exchange on delivery of the bills of lading, but the agent of defendant refused to give up the bills of lading before payment of the bills of exchange, and they were protested. Defendant's agent sold the property on its arrival, and applied the proceeds to the payment of the bills. There was no evidence of any loss sustained by plaintiff in consequence of the time when the sale was made as compared with the price of the article a reasonable time afterwards, nor that plaintiff intended the shipment for any particular purpose which was defeated by defendant's acts; nor any proof of loss, actually sustained from any injury to plaintiff's credit in consequence of the protest of the bills. In an action by plaintiff for damages for protesting his bills, and retaining the bills of lading, and appropriating the proceeds of the cotton: *Held*, that plaintiff is not entitled to recover, as damages, the increased value of the cotton at any time previous to the institution of suit; that defendant cannot claim commissions on the sale of the property, which he had no right to dispose of, and is liable for interest on the balance of its proceeds remaining in his hands beyond the amount of the bills; that the measure of damages in cases of breach of contract is that which will indemnify the party injured; that in cases of breach of contract, even where there is fraud, the damages for which the debtor is liable are those which are the immediate and direct consequence of the breach; and that, where the law does not necessarily infer that the party has sustained damage by the acts complained of, the damage must be alleged and proved so far as the facts are susceptible of proof. *Arrowsmith* v. *Gordon*, 105. *Ryder* v. *Thayer*, 149.

22. In case of the breach of a contract from motives of interest, the party by whom it is broken will be liable for such damage as might have been foreseen, as well as for that which was the direct and immediate consequence of the breach; but for no more. C. C. 1928. *Porter* v. *Barrow*, 140. *Ryder* v. *Thayer*, 149.

23. The allowance of interest from judicial demand on the amount of damages recovered for the breach of a contract, is within the discretion of the court. *Ib. Ib.*

24. In cases of breach of contract through negligence or fraud, no more can be recovered as damages than will fully indemnify the creditor. A jury has no more right to exact a larger sum from a debtor, than they have to increase the amount due by a promissory note. *Ryder* v. *Thayer*, 149.

25. An action for damages for the breach of a contract cannot be maintained without proof of the defendant's having been put in default; but when the plaintiff claims a specific performance of a contract for the delivery of a certain article, or, in the alternative, the value of the article, proof of a putting in default is not required. The claim for a specific performance may be united in the same action with a demand for damages. *Per Curiam*: The commencement of the suit for the performance put the defendant in default as to the damages; and, on a failure to comply with the contract, the court was authorized to render a judgment for damages. C. C. 1905. *Davis* v. *Spurlock*, 208.

26. Where no time is fixed in a contract for the performance of the condition, and the party has not been put in default, it may still be performed. C. C. 2023, 2033, 1907. *Hall* v. *Lorente*, 274.

27. Though there have been repeated violations of a contract by both parties, yet if neither elects to consider it broken, and they proceed under it, neither can be considered as having been in default. *McCord* v. *West Feliciana Railroad Co.*, 285.

28. Where an obligation to pay money at a certain time is silent as to interest, it will commence only from the time of the debtor's being put in default. *Burton* v. *Chaney*, 338.

29. Where a building contract stipulates that the building shall be completed and delivered by a certain time, under a fixed penalty "per month for each house," the builder must be put in default to entitle the other party to recover the penalty. C. C. 2122. *Davis* v. *Glenn*, 444.

VII. *Exercise of Rights and Actions of Debtor.*

30. Where by the acts of a municipal corporation an obligation has been created on its part towards a third person *ex æquo et bono*, the creditors of the latter will be entitled to the benefit of it. *State Bank* v. *Navigation Co.*, 294.

VIII. *Ratification.*

31. Where a ratification is not express, facts must be established from which it necessarily results. *Delabigarre* v. *Second Municipality*, 230.

32. Where a debt due to a partnership had been transferred by a member charged with the liquidation of its affairs, but who was without authority to make such a transfer, and the other partners subsequently ratify the act, they being thereby estopped from questioning the authority of the liquidating partner, any creditor, who by seizing their interest in the debt, pretends to hold under them, will be also estopped from questioning it. *Smith* v. *McMicken*, 319.

IX. *Extinction.*

33. Where there are several debtors, whether each be liable for the whole debt or only for a portion of it, but one of them is primarily liable, and a portion of the debt is received from him, the obligations of the others will be diminished to the extent of the sum received. *Adams* v. *Bank of Louisiana*, 351.

OFFENCES AND QUASI-OFFENCES.

1. No damages can be recovered from the owners of a steamer for injury done to another by a collision, where defendants are not shown to have been in fault. *Ramsey* v. *Greer*, 18.

2. Damages cannot be recovered by the owner of a steamer for injuries sustained by a collision with another boat, though the latter was greatly in fault, where the collision might have been avoided by ordinary care on the part of those in charge of plaintiff's boat. *Carlisle* v. *Holton*, 48.

3. Where a collision takes place between steamers engaged in racing, the owners of neither boat will be allowed to recover damages for any injury sustained, however gross the fault of those in charge of the other boat. *Ib.*

4. In an action for damages against the publisher of a libel, proof of damage resulting from the publication is not necessary to entitle plaintiff to recover. *Per Curiam:* The actual pecuniary damage in actions of this kind can rarely be proved or computed, and is never the sole rule of assessment. *Daly* v. *Van Benthuysen*, 69.

5. One who kills a slave while in the act of committing a larceny within his enclosures, will be bound to the owner for his value, where the circumstances show that the act was not necessary for the defence of his person, his family, or his property. *Bibb* v. *Hebert*, 132.

6. One held in slavery by a person who purchased him in good faith, believing him to be a slave, may recover against the latter wages for the time of his confinement in jail under a sequestration in the suit for freedom, with a fair allowance, in addition, as damages for the imprisonment; but no damages or wages will be allowed for any period anterior to the institution of suit. *Coby* v. *Kock*, 439.

7. In cases of collision between steamers, where there is fault on both sides, neither party can recover damages for any injury sustained. *Murphy* v. *Diamond*, 441.

8. The wrongful withholding of notes or other evidences of debt, cannot subject the party to greater damages than would result from retaining a sum of money equal to their amount, which cannot exceed the interest. C. C. 1928, 1929. Proof that the creditor could have used the evidences of debt or notes to greater profit, cannot authorize any other damages than the amount of interest. *Hutchinson* v. *Sparks*, 548.

9. Damages may be recovered against a police jury for injury sustained in consequence of any illegal obstruction to the navigation of a river, resulting from neglect in the management of a draw-bridge by persons for whose acts the jury were responsible. *Houston* v. *Police Jury*, 566.

10. An officer who seizes the property of a party under an order void on its face, and those who aid him in doing so, will be liable to the owner in damages. *McKinney* v. *Chambliss*, 577.

11. The restrictions imposed on the authority of a master in the punishment of his slaves (C. C. 173. Stats. 7 June, 1806, 19 March, 1816.) are equally obligatory on an overseer, to whom the master may delegate the power of punishment contemplated by law and necessary to the public peace; but if he violates these restrictions by punishing the slaves with cruelty and unusual rigor, he will be answerable to his employer in damages. *Hendricks* v. *Phillips*, 618.

12. The owners of a steam towboat are responsible for any injury to another vessel, occasioned by the steamer's having a *tow* so much beyond her capacity as to disable her powers of locomotion. *Burgess* v. *Beebe*, 668.

13. Where in an action against co-trespassers the action is tried as to one of them separately, any objection thereto must be raised by the co-defendant before going to trial on his own case, or it will be too late. *Byrne* v. *Riddell*, 670.

14. Where a person employs others to commit a wrong, the party aggrieved is not required to make the persons so employed co-defendants in an action for damages against the principal. To construe article 2304 of the Civil Code as requiring this, would be inequitable. Nor is the plaintiff in an action against a principal trespasser and others employed by him, debarred of

the right to obtain, from a jury, a higher verdict against the principal than against those whom he instigated. *Byrne* v. *Riddell*, 670.

15. The allowance of interest on damages *ex delicto* from the date of the act complained of, is unauthorized by law. *Green* v. *Garcia*, 702.

See CORPORATIONS, 14. EVIDENCE, 15.

OPPOSITION OF THIRD PERSONS.

An opposition by a third person will not lie, where the opponent claims to be paid by preference out of the proceeds of property sold under a *fi. fa.* in a suit between others, but alleges, at the same time, the nullity of the judgment under which the sale was made. *Livaudais* v. *Livaudais*, 454.

PARAPHERNAL PROPERTY.

See MARRIAGE, 4, 7, 16.

PARENT AND CHILD.

Where the father and mother are both alive, the former cannot be natural tutor to the minor children; but, as their father, he is, during the marriage, administrator of their estate, and competent to institute judicial proceedings for its protection. C. C. 267. *Snow* v. *Copley*, 610.

PARTIES.

See APPEAL, 2.

PARTNERSHIP.

1. Since the promulgation of the Code of 1825, partnership creditors have been entitled to share equally with the individual creditors in the distribution of the individual assets, it being declared by art. 3152 of that Code, that a privilege can be claimed only for those debts for which it is expressly provided. The rule was different before the adoption of that Code. *Flower* v. *Creditors*, 189.

2. The right of partnership creditors to be paid by preference out of partnership funds, is expressly established by art. 2794 of the Civil Code. *Ib.*

3. A judgment creditor of persons who were members of a partnership then in a state of liquidation, for a debt not a debt of the partnership, cannot seize under a *fi. fa.* a judgment which was an asset of the partnership, nor acquire any legal rights by seizing the interest therein of the individual partners, the defendants in the execution. *Smith* v. *McMicken*, 319.

4. An individual creditor of a partner cannot seize under a *fi. fa.* a particular asset of the partnership, nor the interest of his debtor in a particular partnership asset. He must await the liquidation of the partnership, and, in the meanwhile, seize the residuary interest of the partnership generally, by seizing in the hands of the partnership, or of the person charged with its liquidation, and representing it. The partnership assets are a trust fund for the partnership creditors, who must be paid before the individual partners, and consequently their creditors, can receive any thing. *Ib.*

5. Partners under our law are not tenants in common, in the sense of that term in the english law. *Ib.*

6. A partnership creditor cannot seize under a *fi. fa.* the interest of any individual partner in the partnership; he must seize the assets of the partnership. *Nelson* v. *Conner*, 456.

7. One in the employment of a merchant, whose compensation depends on the profits of the business, and who, if nothing is made, is to receive nothing, and who is shown on several occasions to have held himself out as a partner, will be responsible as such to third persons, though, as between themselves, the parties never intended to create a partnership. *Lee* v. *Bullard*, 462.

8. Partners have a community of interest in every part as well as in the whole of the partnership effects; and, therefore, a sheriff can only make an effectual seizure of the undivided interest of a partner, and preserve it to abide the result of the suit, by taking actual possession of the entire property attached. *Ib.*

9. Where there is no provision in the act creating a partnership for its continuance in case of the death of a partner, it will be dissolved thereby; and the partnership name cannot be used afterwards, so as to bind the partners, but in virtue of some new authority. Such authority may be inferred from the subsequent conduct of the parties. *Cane* v. *Battle*, 642.

See BILLS OF EXCHANGE, ETC., 13. CORPORATIONS, 1. LEASE, 5. OBLIGATIONS, 32.

PAYMENT.

1. One who, having bound himself as bail for the defendant, in an action by a passenger against the master of a ship for the value of property lost through the neglect of the officers and crew, is compelled to pay the amount of the judgment obtained against the master, will be subrogated to the judg-

ment so paid by him and its incidents, and will have the recourse which the master would have against the owners of the ship had he paid the judgment; but he will not be subrogated to the original cause of action resulting from the neglect of the master, so as to affect other parties by his having paid the judgment against the latter, and to entitle him to recover the amount paid from the owner of the ship. *Tardy* v. *Allen*, 66.

2. In an action on a written obligation payable in the notes of a particular bank, judgment will be rendered for the sum mentioned in the obligation, reserving to the defendant the right to discharge it in notes of the bank designated in the instrument; and not for the value of the sum for which the obligation was executed, in the notes of the bank at their actual value at the time of the breach of the contract by the debtor. *Roberts* v. *Slark*, 71.

3. Imputation must be made at the time of payment; it cannot be made afterwards. *Adams* v. *Bank of Louisiana*, 351.

4. Where under an execution issued on a judgment rendered on a joint and several note against two debtors, one of whom was surety for the other, property is sold at a credit of twelve months and purchased by the principal debtor, the surety on the twelve months' bond, on paying it, will have no recourse against the other debtor, who was merely a surety. *Per Curiam:* A surety on a twelve months' bond, on paying it, acquires no right whatever beyond the contract itself to which he was a party, and no interest in the judgment under which the property was sold for which the bond was given. This rule applies where a defendant becomes a purchaser and gives his bond, as well as to cases in which the purchasers are strangers to the original suit. *Old.* v. *Chambliss*, 205.

5. Where an imputation of payment is made by the creditor in the receipt he gives, it must be equitable to be valid. *Ib.*

6. Where all things are equal, and there has been no imputation of payment, it must be made proportionally. C. C. 2162. *Ib.*

7. Where one of several co-proprietors of a lot of ground pays for the whole cost of pavements made on the requirement of the city authorities, and for which the property was bound and the co-proprietor individually liable, having an interest in discharging the debt he will be subrogated to the rights of the paver, and may recover from his co-proprietors their proportions. *Succession of Whitehead*, 396.

8. A surety on a custom-house bond, who paid its amount to the United States while the Code of 1808 was in force, became thereby subrogated to the rights of the United States against the principal, to priority of payment and interest out of the property of the principal. B. 3, tit. 3, art. 151. *West* v. *Creditors*, 529.

9. Under the Code of 1808, b. 3, t. 3, art. 151, subrogation took place of right for the benefit of one who, being himself a creditor, paid another creditor whose claim was preferable to his own. *Ib.*

10. A surety on a twelve-months' bond does not, by paying it, become subrogated to an equivalent portion of the judgment under which the property for which the bond was given was adjudicated. He is subrogated only to the rights of the creditor of the bond, acquiring no interest in the judgment. *Crow* v. *Walsh*, 540.

11. Where an attorney to whom a claim has been entrusted for collection, releases, without authority, a part of the debt, in consideration of the payment of the residue, the debtor cannot, on the refusal of the creditors to sanction the compromise, reclaim the amount so paid either from the attorney or the creditor. The act of an agent, though unauthorized, is not always wholly void; it may be good so far as authorized, and void for the rest. *Pickett* v. *Bates*, 627.

See Execution of Judgment, 7.

PETITORY ACTION.

1. A vendor does not represent the purchaser, in relation to real rights alienated by him. He has divested himself of them, and cannot dispose of, nor compromise, them in any way to the prejudice of the purchaser, by whom, or against whom, all actions affecting them must be brought. The purchaser is not bound to intervene though he may have knowledge of the proceeding. *Delabigarre* v. *Second Municipality*, 230.

2. An action by the administrator of a deceased husband against the surviving wife, to compel her to deliver up certain slaves alleged to belong to the community, is not a possessory action; the only issue between the parties is one of title. *Joor* v. *Craig*, 260.

3. Slaves, being immovables, a plaintiff may institute an action for their recovery either in the parish in which they actually are, or in that of the domicil of the defendant. The fact of their belonging to a succession does not exempt the representative of it from the operation of this rule. C. P. 163, 983. *Scott* v. *Bowles*, 637.

4. A petitory action must be instituted against the person in actual possession of the property claimed, who, if he disclaim the ownership, must disclose the name and residence of the owner, when the action should not be dismissed, but the plaintiff should be allowed to cite the real owner. C. P. 43. *Ib.*

See Evidence, 14.

PLEADING.

I. *Petition.*

1. An amended petition may be received even after the trial has commenced, where its only object is to correct a mistake in the name of the plaintiff, e. g. by substituting *Joseph* for *John*. *Per Curiam:* Amendments are reducible to no certain rule; each case must be left to the sound discretion of the court. An amendment should or should not be permitted as it will tend to furtherance of justice; provided that amendments to the petition do not alter the substance of the demand, and those to the answer be not of a dilatory kind. C. P. 419, 420. *McMullen* v. *Jewell*, 139.

2. It is not necessary in order to impeach, on the grounds of fraud or wilful concealment of property, the certificate of a bankrupt obtained under the act of Congress of 19 August, 1841, that the grounds of impeachment should be set fourth by plea; it is enough that there be prior reasonable notice to the bankrupt, specifying in writing such fraud or concealment. Act of 19 August, 1841, s. 4. *Selby* v. *Gibson*, 209.

3. When a suit is brought on a note it need not be annexed to the petition. Act of 7 April, 1826, sec. 2. But if not annexed the defendant may pray oyer, and have it produced in a reasonable time. *Lee* v. *Lacoste*, 223.

4. The statement in the petition that a note on which the action was brought is made a part of the petition, when in truth the note was not filed at the time, is mere surplusage. *Ib.*

5. In an action on a note payable to, and in possession of the plaintiff, it is not necessary that he should allege, in special terms, that he is the holder and owner. *Snow* v. *Trotter*, 268.

6. An amendment inconsistent with the original petition is inadmissible. *Bemiss* v. *Dwight*, 337.

7. A party must be held to the material and substantive allegations of his petition; nor will he be permitted to derive any advantage from their contradictions or obscurity. *Blackly* v. *Matlock*, 366.

8. Where, in an action on a foreign judgment, the petition alleges that a note, which was the original evidence of the debt, is merged in the judgment, and the action cannot, under the evidence, be maintained upon the judgment, the petition must be dismissed. The action cannot, under the pleadings, be sustained on the note. *Bordelais* v. *Maugars*, 375.

9. An action on a contract made with an association must be brought in the name of all the individuals composing it, if unincorporated, (C. C. 437); if incorporated, in its corporate name. C. C. 423. No recovery can be had in an action on such a contract by the president of the association, where the prayer is for a judgment in his favor individually. *Soller* v. *Mouton*, 541.

10. Where a defendant is sued on a note, and pleads in compensation another note, for a larger amount, due to him by plaintiff, the latter will not be allowed to amend his petition for the purpose of claiming the amount of an unacknowledged account. The new claim not being equally liquidated with the note pleaded by the defendant, nor connected with it, was not a plea in compensation or reconvention. C. C. 2205. C. P. 375. *Phelps* v. *Stone*, 617.

See Attorney at Law, 2. Bills of Exchange &c., 5. Citation, 1, 2. Executory Process, 7, 8.

II. *Answer.*

11. Where a party enjoins an order of seizure and sale, and the defendant in injunction converts his executory process into a proceeding *viâ ordinariâ*, and, in an amended answer, pleads the exception *rei judicatæ*, no service of the amended answer will be necessary. *Barrow* v. *Wright*, 130.

12. Where a plaintiff alleges his residence and that of the defendant to be in a particular parish, and the defendant, after a judgment by default against him, answers denying specially that the plaintiff was a resident of the same parish with himself, and setting up a claim in reconvention, evidence to prove the residence of the plaintiff to be as alleged in the answer cannot be excluded on the ground that, the exception to plaintiff's residence was a dilatory one, which should have been made *in limine litis*. *Per Curiam:* The allegation in the answer that defendant's residence was in a different parish, was not a plea interposed to retard the suit, which cannot be set up after a judgment by default; but an averment necessary to be made and substantiated, to enable the defendant, under the stat. of 20 March, 1839, sec. 7, to institute a demand in reconvention, though not necessarily connected with, or incidental to, the main cause of action. The allegation is a plea to the merits, and necessary to give jurisdiction to the court of the reconventional demand. *Bird* v. *Barrow*, 143.

13. A bankrupt discharged under the act of Congress of 19 August, 1841, who wishes to avail himself of his certificate, must plead it specially. *Palmer* v. *Moore*, 208.

14. A judgment creditor if opposed in the execution of his writ, will be allowed to show the transfer which the opponent holds to be simulated; but to authorize such proof, when the possessor avers that he is

the owner and exhibits a title, simulation must be specially alleged in the answer. The possessor must be informed by the pleadings of the attack to be made on his title, or testimony to establish its simulation will be inadmissible. *Clark* v. *State Bank*, 325.

15. Separate actions may be carried on against the same defendant, by the same plaintiff, for the same debt, where in one a judgment is prayed for against him as an absentee and his property is attempted to be reached by an attachment, and the object of the other is to annul the sale of the same property, for the purpose of subjecting it to his claim. *Foxworth* v. *Burckhalter*, 365.

16. Where two actions are pending between the same parties for the same cause, the defendant, in case of their inconsistency, can only require that the plaintiff should elect which of the two he will proceed with. If one of the two be dismissed before any exception to their inconsistency, it is enough. *Ib.*

17. Where a plaintiff's right in an action is purchased *pendente lite*, and the purchaser intervenes and is substituted to the original plaintiff, and defendant is informed, for the first time, by the introduction of the act of transfer in evidence on the trial, of the consideration for which the transfer was made, it will not be too late to file an amended answer praying to be released, on paying the price of the transfer, with interest from its date. *Farrell* v. *Austin*, 626.

See BANKRUPT, 2.

III. *Intervention.*

18. Where the defendant in an action commenced by attachment appears on appeal, and asks that the judgment against him be reversed, an intervenor cannot object to the mode in which the writ of attachment was executed. *Yeatman* v. *Estill*, 222.

19. In an action by a wife against her husband for a separation of property, intervenors are entitled to the delay necessary to cite the original parties, and for them to answer, though the effect may be to retard the action. *Dubroca* v. *Husband*, 331.

20. Where an intervenor in an action between a husband and wife for a separation of property, excepts to a decision of the court refusing to delay the trial to enable him to cite the original parties, but afterwards enters into, and files in the case, an agreement by which he waives his opposition to the cause being then tried, in consideration of the plaintiff's agreeing, as far as she was concerned, in the execution of any judgment she might recover, to sell the lands, slaves, and moveables separately, and the case is tried and plaintiff obtains a judgment, the intervenor cannot afterwards, on the ground of a violation of the agreement as to the sale of the property, take a judgment by default and proceed to try his intervention. The action was ended when final judgment was rendered for the plaintiff, on the waiver of the right of the intervenor. The judge could pronounce upon the merits of the intervention only at the time of deciding the principal action. C. P. 394. The waiver was equivalent to a withdrawal of the intervention. The remedy of the intervenor, for the violation of the agreement, is by a separate action. *Ib.*

PLEDGE.

1. An act of pledge, *sous seing privé*, to have effect against third persons, must be recorded in the office of a notary. C. C. 3125. A registry in the office of conveyances is insufficient to give it any effect against third persons. *Succession of Argote*, 477.

2. Where an act of transfer of the rights of an heir in a succession recites a previous pledge of the hereditary rights to a third person, the transferee cannot oppose her act of transfer to the claim of the pledgee, though the act of pledge had not been recorded in the office of a notary, but a subsequent acquisition by her of the rights of the heir, by a title superior to that of the first transfer, or to any claim that could be set up by the pledgee, will be valid. *Ib.*

3. Sections 3, 5, of the statute of 20 March, 1827, establishing an office for the registry of conveyances in New Orleans, relate to the registry of such acts of transfer as convey the title to property, and not to acts intended to secure an endorser against the consequences of an endorsement. *Succession of Argote—Rehearing*, 478.

POLICE JURY.

1. Where the preamble of a statute declares that doubts have arisen as to the legality of certain ordinances of a police jury, which are inserted at length in the preamble, and the statute declares that the ordinances shall have full force and effect, no objection can be made to their legality on account of the form adopted by the legislature to give them validity. *Bathurst* v. *Course*, 260.

2. The validity of an ordinance of a police jury, proved by the testimony of the clerk of the jury to have been duly enact-

ed and promulgated, cannot be effected by the omission of the clerk to transcribe on the minute-book kept for that purpose the proceedings of the meeting at which it was passed. The omission may be corrected at any time, *nunc pro tunc*. *Ib.*

3. Police juries are authorized to establish ferries, and to annex penalties to violations of the exclusive privileges they may grant to the lessees of such ferries. Stats. 25 March, 1813, s. 5; 24 February, 1843, ss. 17, 18. But the statutes granting such powers must be strictly construed, and the exercise of the powers conferred limited to the precise terms of the grant. Where a statute empowers a police jury to declare the penalties for violations of the rights to ferries which it may accord, but confers no authority on the police jury to delegate to individuals, to whom such ferries may be leased, the right to enforce those penalties in civil actions, in their own names, the authority will be presumed to have been intentionally withheld. The jury alone, in their own name, can enforce the penalty; the lessee of a ferry, in such a case, has no remedy for a violation of his privileges, but by an action for damages and an injunction. *Miles* v. *Craig*, 635.

See Evidence, 38. Lease, 4. New Orleans, 1. Obligations, 14.

POSSESSION.

One whose possession commenced and was continued in bad faith, is answerable for rents accrued previously to the commencement of suit. *Hill* v. *Bowden*, 258.

POSSESSORY ACTION.

1. Possession in another State of a slave who had runaway from his master, a resident of this State, cannot be the basis of a possessory action here. The possession continued in his master, whose rights remained unimpaired. The law establishing that action is a real statute, and has no extra-territorial operation. *Oates* v. *Caffin*, 339.

2. Article 49 of the Code of Practice, authorizing possessory actions for slaves, is limited, by the dispositions of the statutes relative to slaves and by the penal statutes, to such slaves as are not fugitive, or have not been stolen. *Ib.*

PRESCRIPTION.

See Cessio Bonorum, 7.

I. *Lex Fori.*

1. Prescription being governed by the *lex fori*, where an instrument executed in another State is negotiable by its laws, but not negotiable by the laws of this State, an action on it here will not be barred by the prescription established by the laws of this State for negotiable instruments. *Per Curiam:* Where certain classes of contracts are enumerated in a statute establishing a prescription, a contract sued upon in our courts must be declared to be within or without the statute according to the character which our own laws attribute to it. *Lacoste* v. *Benton*, 220.

II. *Commencement.*

2. In calculating "the forty days following the promulgation of the statute of 27 March, 1835," restricting to that period the right of married women to retract the renunciations of any legal rights made by them in the sale of immovables, the day on which the act was promulgated, or that on which the term commenced—the day *a quo*, must be excluded; the day *ad quem*, or that on which the term expired, being included. Thus, in computing the forty days under the act, which was published in the official gazette on the 10th April, and was promulgated at the seat of government the day after (stat. 24 March, 1827, s. 1), the period must commence with the 12th of April; and a notice of retraction by a married woman served on the 21st May, is in time. *De Armas* v. *De Armas—Rehearing*, 527.

See 9 *infra*.

III. *Of One and Three Years.*

3. Claims for board and lodging, are not cases in which the continuousness of the supply can effect the course of prescription. C. C. 3499, 3500. *Boeto* v. *Laine*, 141.

4. The right of action on a contract, made by a government mail contractor with the owners of a steamer, to convey the mail, is not prescribed by one year. C. C. 3499. Such a contract cannot be considered one of affreightment. *Riley* v. *Hart*, 184.

5. The action to annul a contract on the mere grounds of the preference given to one creditor of an insolvent over another, is prescribed by one year. C. C. 1982. *Gillespie* v. *Cammack*, 248.

6. Where certain mortgage creditors of an insolvent sue to annul a judgment rendered on the confession of the debtor, and recorded anterior to the date of their mortgage, on the allegation that the confession was a contract in fraud of the other creditors, the action must be brought within the time prescribed by art. 1982 of the Civil Code.

The rule *Quæ temporalia*, &c. is inapplicable to this case; it is limited to cases where the defendants who set it up as an exception are in possession of the thing, or in the enjoyment of the liberty which the contract offered to them is intended to restrain. Here the judgment creditor was in possession of a mortgage right dating from the time of its registry. *Ib.*

7. An action for a balance due on a written contract between certain physicians, as proprietors of an infirmary, and a committee of an unincorporated association, by which the former undertook to "receive in their infirmary and to furnish medical treatment and all necessary medicaments and nurses to all persons who may be sent to the infirmary by the association, for a certain sum each day, the arrangement to continue in force for three years," is prescribed under articles 3499, 3503 of the Civil Code. The debt due under such a contract is not comprehended within the exception contained in the last clauses of articles 3500, 3503 of the Code. *Campbell* v. *Nicholson*, 458.

8. The prescription established by article 1989 of the Civil Code does not apply to simulated sales. *Pickett* v. *Bates*, 627.

IV. *Of Four Years.*

9. Inadequacy of price is either lesion or evidence of fraud. If lesion, the action to annul is barred by four years. If taken as evidence of fraud, the action is limited to ten years from the discovery of the fraud; and, in the absence of other evidence, the period of prescription must commence from the date of the sale. *Ross* v. *Ross*, 533.

V. *Of Five Years.*

10. All absolute nullities resulting from defects of form are embraced within the general provisions of art. 3507 of the Civil Code. *Vaughan* v. *Christine*, 328.

11. Absolute nullities are of two kinds: those resulting from stipulations derogating from the force of laws made for the preservation of public order or good morals, and those established for the interest of individuals. The former are not susceptible of ratification, and the prescription of five years, under art. 3507 of the Code, is inapplicable to them; but if, by subsequent dispositions of law or by the succession of time, such stipulations cease to be illegal, they may from that time be ratified, and become subject to the prescription of art. 3507. Thus the partition of a succession made before the succession is open, may become valid by ratification, or by lapse of time, after the opening of the succession. But in relation to absolute nullities established in the interest of individuals, the rule is, as to onerous contracts, without exception, that the party in whose favor they are established may ratify the contracts, either expressly or impliedly. *Ib.*

12. Articles 3442, 3444, which provide that one who acquires a slave in good faith, and by a just title, will be protected by the prescription of five years if the real owner resides in the State, and by ten years if he resides out of it, apply only to the owner; they do not affect mortgage creditors. Prescription is acquired by the third possessor of mortgaged property, not by the lapse of time established for the prescription of the property itself, but by that fixed for the hypothecary action. *Bibb* v. *Union Bank*, 334.

13. A note in these words: "I promise to pay to the order of A." &c., but which, instead of being endorsed by A., has his signature affixed to it under that of the maker, is neither payable to order nor bearer; and an action on it will not be prescribed by five years, under article 3505 of the Civil Code. *Burton* v. *Chaney*, 338.

14. An action against the endorsers of a promissory note made and endorsed in another State, is prescribed by five years from the date of the note, under articles 3505, 3506, of the Civil Code, though the endorser resided for a part of the time in the State where the note was made. The rule *Contra non valentem*, &c., is inapplicable to such a case. *Hatch* v. *Gilmore*, 508.

15. Any informality in the advertizement of a judicial sale is cured by the prescription of five years, established by section 4 of the stat. of 10 March, 1824. The statute applies to sales made previously to its enactment; but the prescription of five years runs only from the date of the statute, as to anterior defects and informalities. *Foster* v. *Roussel*, 546.

VI. *Of Ten Years.*

16. One who exhibits a judgment regularly obtained, an execution issued thereon, and a sheriff's deed to him, has a *just title* in the sense of art. 3450 of the Civil Code, sufficient to acquire by the prescription of ten and twenty years. In such a case it is not incumbent on the defendant to show a perfect title from the real owner; a title translative of property, derived from a person whom he honestly believed to be the owner, is a sufficient foundation on which to rest the prescription invoked. C. C. 3447, 3448. *Leduf* v. *Bailly*, 8.

17. All personal actions, except those for which the law has provided a shorter term, are prescribed by ten years, if the creditor be present; and neither the nature of the debt, nor the mode of life of the debtor,

can effect the rule. C. C. 3508. *Barrelli Rivière*, 46.

18. Prescription will bar any proceedings commenced by a creditor of a corporation, under the provisions of section 13 of the statute of 20 March, 1839, by propounding interrogatories to a stock-holder to ascertain if he was not indebted to the corporation, where more than ten years had elapsed since the maturity of the last instalment due on the stock before the institution of the proceedings. C. C. 3508. *Brown* v. *Union Insurance Company*, 177.

19. It would be a breach of good faith to the public and to individuals to resume possession of portions of ground which have been deliberately dedicated for streets, or over which the public has notoriously exercised a right of passage for more than ten years, which of itself would give the public a right of way without any dedication. *New Orleans and Carrollton Railroad Co.*, v. *Carrollton*, 282.

20. Notes not payable to order or bearer, are subject only to the prescription of ten years, established by article 3508 for personal actions generally. *Succession of Harrell*, 323.

21. One who has the right to attack an onerous contract which the law declares null for his private benefit, makes it valid and obligatory on him by his ratification, express or implied, or, in default of ratification, by his voluntary execution subsequently to the period at which the allegation could have been validly confirmed or ratified. This rule admits of no exception. Every nullity which may be thus ratified is prescribed by ten years, under article 2218 of the Civil Code. The only class of nullities to which this prescription is inapplicable, are those resting on motives of public order or utility, or taking their source in the respect due to morals; and, even in such cases, if the contract ceases to be illicit, it is, from that time susceptible of ratification, and the prescription of ten years applies to it. *Ross* v. *Ross*, 533.

See IV. *supra*.

VII. *Of Twenty Years.*

22. After possession for twenty years by a purchaser under a sale made by one acting as an agent, the authority of the agent cannot be contested. *Moore* v. *Hampton*, 193.

23. After twenty years the authority of an agent will be presumed. *Delabigarre* v. *Second Municipality*, 230.

VIII. *Of Thirty Years.*

24. The road known as the Metairie road, extending from the bayou St. John, along the bayou Metairie, to the settlement of Cannes Brulées on the Mississippi river, was not a public highway of which the soil belonged to the sovereign; and having been abandoned by the public for more than thirty years, during which time the possession of individuals, under their respective titles, has been undisturbed, it can no longer be subjected to public use. *Hatch* v. *Arnault*, 482.

IX. *Interruption or Suspension.*

25. The provisional seizure of a steamer by a privileged creditor will suspend the prescription running against his claim; but will not suspend prescription as to the claims of other creditors. *Scott* v. *Creditors*, 40.

26. Prescription in favor of the endorser of a draft, is not interrupted by the acknowledgment of the debt by, nor by the citation of, any other party. *New Orleans and Carrollton Railroad Co.* v. *Chaney*, 262.

27. It is not necessary to interrupt prescription, that the acknowledgment of a debt should be in writing, nor that it should be made in the presence of the creditor. C. C. 3486, 3517. *Succession of Harrell*, 323.

28. The rule in regard to other prescriptions, that an interruption dates only from the time of its being brought home to the parties affected by it, applies to questions arising under the stat. 27 March, 1835, allowing married women to retract within forty days from its promulgation, certain renunciations of their legal rights. *De Armas* v. *De Armas*, 526.

29. Laws of prescription, and those limiting the time within which actions may be brought, are retrospective in their operation. *Ib.*

30. A partial payment by a debtor on an obligation interrupts prescription, being an acknowledgment of the debt. C. C. 3486. So where a debtor, who had executed a bond for the amount of a loan and mortgaged property to secure its payment, leases the mortgaged premises, stipulating in the act of lease that it shall not be affected by the death of the lessor, and that the lessee shall pay the debt out of the rent, a payment on the bond by the lessee will have the same effect in interrupting prescription as if made by the debtor himself; and this, whether the payment was made before or after the death of the lessor; and where the heirs of the lessor have accepted his succession, they will be bound by the payment. *Consolidated Association* v. *Comeau*, 552.

31. The prescription of debts is neither interrupted, nor suspended by the death of

the debtor. C. C. 3487, 3492. To preserve his rights, the creditor must cause the succession to be represented in time to present his claim. *Succession of Linderman*, 714.

X. *By and Against Whom Pleaded.*

32. Reconventional demands are not exceptions within the meaning of the rule, *Quæ temporalia sunt ad agendum, perpetua sunt ad excipiendum.* The rule must be restricted to exceptions necessarily attached to and inseparable from the demand. *Boeto* v. *Laine*, 141.

33. The rule that where a contract containing reciprocal and synallagmatic conventions continues to be executed by one of the parties, the other cannot refuse to execute his part, under the pretext of prescription, though those conventions be only accidental, forms no part of the law of prescription, either under the Code Napoléon, or the Code of this State. *Brown* v. *Union Insurance Co.*, 177.

XI. *Effect.*

34. The presumption of payment, which the law raises in cases of prescription releasing from debt, is *juris et de jure.* In such cases the debtor is not required to produce any title, nor to be in good faith. C. C. 3494, 3496. *Brown* v. *Union Insurance Company*, 177.

35. In all cases of executed contracts susceptible of tacit ratification, a presumption of ratification *juris et de jure*, results from silence and inaction during the time fixed for prescription. *Vaughan* v. *Christine*, 328.

36. Where a debt is extinguished by prescription, a mortgage given to secure its payment being a mere accessary, is extinguished with it. *Succession of Linderman*, 714.

PRIVILEGE.

1. Art. 3194 of the Civil Code does not apply to the case of the vendor of a steamer; the privilege to which he is entitled is established by article 3204, s. 8. *Scott* v. *Creditors*, 40.

2. The vendor of a steamer engaged in making voyages between a port in this State and the ports of another State, will retain a privilege on the boat only for sixty days from the date of the sale. C. C. 3212. *Ib.*

3. The vendor's privilege for supplies furnished to a steamer engaged in making voyages between a port of this State and those of another State, continues only for sixty days from the date at which the articles were furnished. *Ib.*

4. An overseer entitled to a privilege on the product of the last crop, under art. 3184 of the Civil Code, may enforce his privilege against a purchaser of the plantation and crop, after the crop has been sold and the proceeds received by the purchaser. The privilege is not extinguished by the sale of the crop. *Welsh* v. *Barrow*, 133.

5. Where the factors of a planter keep two separate accounts, one in the name of a particular plantation, and the other in that of R. its ostensible owner, and the balance on the latter is in favor of R., but the factors are creditors on the plantation account, the balance due on the latter, with the privilege attached to it, will not be extinguished by that due to R. on his private account, where there is no allegation or proof of fraud, nor any violation of the rights of mortgage creditors upon the crop on which the balance against the plantation is privileged. *Farrar* v. *Rowley*, 276.

6. Where the price of mules, purchased for the use of a plantation and paid for by a third person, is reimbursed by a draft on the factors of the planter, the advance will be a privileged claim under art. 3184 of the Civil Code. The mules were "*necessary supplies*" within the meaning of the statute, and the extinguishment of the vendor's privilege, brings the advance within the fair intendment of the statute. *Ib.*

7. An overseer whose services have continued during one year and a part of a second, has, under art. 3184, § 1, of the Civil Code, a privilege on the crop of the second year, valid against a third person, who purchases during the second year, the plantation and crop then in the ground. *Ib.*

8. No privilege is allowed to editors, reporters, printers, or carriers employed in a newspaper establishment, on the property of the establishment, for arrears of salaries or wages due to them. Such persons are not comprehended in the terms "clerks, secretaries, or other persons of that kind," used in sec. 6 of article 3158 of the Civil Code, nor in sec. 5 of art. 3249, nor in sec. 5 of art. 3221. *Stevens* v. *Sawyer*, 428.

9. The privilege acquired by a creditor, under art. 722 of the Code of Practice, by the seizure of real property of his debtor under a *fi. fa.*, must be postponed, in case of the subsequent death of the debtor, to those for funeral and law charges and for the expenses of the last illness of the debtor. But the moveables of the succession must be exhausted before the immovables can be resorted to, for personal and law charges, and the expenses of the last illness. C. C. 3220, 3233, 3236. *Succession of Holbert*, 436.

10. Where goods are consigned to a factor with instructions as to the payment of the proceeds, the acceptance of the consignment is an acceptance of the instructions, and an implied promise to obey them; and, under such circumstances, no privilege will attach to the property, in favor of the factor, under art. 3214 of the Civil Code, and the stat. of 17 Feb. 1841, for any general balance due to him. To apply the property to the payment of the factor's debt, would be inconsistent with the implied promise, and the just expectation of the consignor. But when the instructions further directed that he should retain out of the proceeds of the consignment a sum to be placed to the credit of the consignor, and the amount of certain charges, he will be entitled to retain that sum and the amount of the charges out of the proceeds, in preference to any attaching creditor of the consignor. *Goodhue* v. *McClarty*, 447.

11. The privilege of the vendor is not required to be expressly stipulated; it springs from the nature of the debt, and exists by force of law, unless renounced. The renunciation need not be express, it may be implied from the terms of the instrument; but the intention to renounce must not be doubtful; it must be clearly deducible from the language of the parties. *Boner* v. *Mahle*, 600.

12. The mere omission to stipulate a special mortgage, cannot be considered a renunciation of the higher right of privilege; nor can such a renunciation be inferred where the omission to take a special mortgage is accompanied by the granting of a mortgage upon other property; nor, where a special mortgage has been taken, will its subsequent release affect the creditor's privilege. *Ib.*

13. The recital in an act of sale that the purchaser, "in order to secure the payment of the notes for the price, hereby mortgages" certain property previously belonging to him, cannot be considered as evidence of an implied release of the vendor's privilege. *Ib.*

14. Children of a female slave born since the sale of the mother, are subject to the vendor's privilege. C. C. 183, 491, 539, 557. Stat. of 7 June, 1806, ss. 9, 10. *Ib.*

15. Decision in *Garrettson* v. *His Creditors*, 1 Rob. 445, as to the privilege of a lessor, affirmed. *Hoey* v. *Hews*, 704.

See Evidence, 54. Mandate, 1. Partnership, 1, 2.

PUBLIC LANDS OF THE UNITED STATES.

1. The presentation of a petition to a spanish intendant of the province of Louisiana praying for the grant of a tract of land, which was referred to the surveyor general to report thereon, but on which no further action had been had at the time of the transfer of the territory to the United States, the petitioner never having had actual possession of the land, can confer no title to it. *Lafayette* v. *Blanc*, 59.

2. Sec. 1 of the act of Congress of 12 April, 1814, only confirmed titles to lands claimed by virtue of incomplete french or spanish grants, concessions, warrants, or orders of survey, granted prior to 20 December, 1803, and having a special and definite location. It did not confirm any claim unsupported by written evidence of title emanating from the french or spanish governments. *Ib.*

3. In order that a confirmation may have the force and effect of a patent, the description in the inchoate title or in the act of Congress must be such as will identify the land. If the description will fit another place as well or better, it is defective, and will not protect the holder, who can show no original possession, against a subsequent location made under the authority of Congress. *Ib.*

4. No title passed under an inchoate spanish grant. The title remained in the sovereign until a complete grant was issued. *Pontalba* v. *Copland*, 86.

5. A patent issued by the United States for public lands, is conclusive proof that the party in whose favor it was issued had complied with the requirements of the act of Congress, as to making improvements on the land, &c. *Jenkins* v. *Gibson*, 203.

See Obligations, 4. Sale, 5.

PUBLIC THINGS.

1. The sovereign alone has the right to change the destination of public places. *Delabigarre* v. *Second Municipality*, 230.

2. No particular form or ceremony is necessary in the dedication of land to public use; all that is required is, the assent of the owner, and the fact of its being used for the public purposes intended by the appropriation. But when the dedication is not express, and is to be inferred from the acts and conduct of the owner, and the use by the public, these ought to be such as to exclude any other hypothesis but that of dedication. In all such cases, the consent of the owner must appear. *New Orleans and Carrollton Railroad Co.* v. *Carrollton*, 282.

3. If a piece of ground be left unenclosed for the convenience of the owner, who uses it for a specific purpose in the usual course

of his business, the fact that he does not exclude persons from passing through it, or that, when the ground is within the limits of a town, he has represented it as open and unenclosed, as it really was at the time, upon a plan on which he has sold other town lots not necessarily connected with that open space, cannot, under any circumstances, be fairly considered as proof of a dedication to public use, of the ground thus left open. *Ib.*

4. The soil of the roman *viæ publicæ* was public property; but the law in relation to those great works, which were designed to be as permanent as the labor of man could make them, cannot be applied, without modification, to an infant colony, such as Louisiana was while under the dominion of Spain, without population, and a portion of whose soil only was beyond the reach of annual inundation, and where the roads were necessarily such as the changes in the rivers and future settlements would require. *Hatch* v. *Arnault*, 482.

5. The principle established by the decision in *Renthorp* v. *Bourg*, 4 Mart. 97, that the soil of a highway is public property, cannot be extended to all highways or public roads in this State. *Ib.*

6. The Code of 1825 distinguishes between *grands chemins* or highways, and *chemins publics* or public roads. The former are of that class of public things, the property of which is vested in the whole nation (Code of 1808, b. 2, tit. 2, art. 6. Code of 1825 art. 444); while the latter may be made on land subject to private ownership. Stat. 12 March, 1818, s. 2. The Code of 1825 cannot be considered as altering the law on this subject, as it stood at the time of its promulgation, but as declaratory of it. While it recognized the doctrine in *Renthorp* v. *Bourg*, to its proper extent, it established those reservations which became necessary as the country, in its settlement, was continually undergoing changes. The roads, old and new, in this State, are generally what are denominated in the Code public roads, hence it by no means follows, because a road is a public road, that the public has any right to the soil after it has been abandoned. Whether there are roads in this State of the class of *viæ publicæ*, it is not necessary to decide. *Ib.*

QUASI-CONTRACT.

1. Money paid to a creditor, though paid by one who was not the real debtor, cannot be recovered, where the creditor received no more than was really due to him. *Thompson* v. *Chrétien*, 116.

2. Where one of several co-proprietors of property, not partners, makes advances for the benefit of the common estate, without any contract with his co-proprietors, no joint obligations arises on the part of all the co-proprietors to pay an entire sum, but each is bound to refund according to his interest. *Fuselier* v. *Lacour*, 162.

3. Where a payment in kind is made, of slaves estimated at a certain sum, on account of a debt due by contract, and the slaves are reclaimed as an over-payment, the party to whom they were delivered will be liable merely for interest from the demand for restoration, and not for the value of the hire of the slaves. *Davis* v. *Glenn*, 444.

4. One who transfers by delivery, without endorsement, a bill for a sufficient consideration, knowing it to be of no value, where the assignee is not aware of its want of value, will be bound to repay the money received, though there was no representation of the solvency of the parties. C. C. 2619. *Hewitt* v. *Waterman*, 716.

See Bills of Exchange, &c., 11.

RECISION.

See Sale, 13 to 17, 25.

RECONVENTION.

See Pleading, 12. Presciption, 32.

REGISTRY.

See Lease, 2, 16. Registry, 1, 3, 7, 9, 10. Pledge.

RULE TO SHOW CAUSE.

See Summary Proceedings.

SALE.

See Privilege, 1, 2, 3, 11 to 14.

I. *Conditions Essential to Existence and Validity.*

1. An obligation by which the vendor of a butcher's stall in a city binds himself under a penalty not to sell, or cause to be sold, any meat of a particular kind within the city during two years, is not invalid as being in restraint of trade; and if the condition be violated the penalty may be enforced. *Wintz* v. *Vogt*, 16.

2. One who purchases a female slave af-

ter a child of her's under ten years of age had been sold separately to a third person, cannot claim to be the owner of the child, on the ground that the sale of a child separately from its mother is prohibited by law, where the child was sold at a time when the mother had escaped into a country where slavery did not exist, and her master never expected to recover her. *Keller* v. *Fink*, 17.

3. Where one who was the principal agent in effecting a sale of lands does not inform the purchasers of the fact of his being a part owner, such omission or concealment, whatever may have been its motive, is not such a fraud as will avoid the contract, where the purchasers have sustained no damage in consequence, and nothing has happened in consequence of such omission which would not have happened without it. *Slidell* v. *Rightor*, 199.

4. The sale of the property of another is null; and in such a case eviction by judicial authority is not required to entitle the purchaser to relief. C. C. 2427. *Hall* v. *Nevill*, 326.

5. The sale of a preëmption right, in contravention of a prohibitory clause in the act of Congress under which the right of preëmption accrued, is null; and constitutes no impediment to an entry of the land by the party entitled to the preëmption, who will, by the purchase from the government, acquire an absolute title, unaffected by the previous sale. *Seaton* v. *Sharkey*, 332.

See TUTORSHIP, 4, 9.

II. *Warranty.*

6. Where a broker, acting as the agent of the vendor of a quantity of salt stored in bags, represents to the purchaser that it had been in store only five or six months, when it had in fact been stored for fifteen or eighteen months, and the evidence shows that the statement of the broker produced the impression on the mind of the purchaser that it had not been stored longer than five or six months, the representation being as to a point material in judging of the condition of the article, and the vendor being bound by the representations of his agent, the sale will be rescinded; and this though the purchaser examined the salt before buying, for the misrepresentation might have influenced the character of the examination made by him. *Millaudon* v. *Price*, 4.

7. The general rule is that a vendor is bound to good faith, and if he knows the article offered for sale to be defective he is bound to state the defects. The exception to this rule is that, where the article is susceptible of convenient inspection and examination, the purchaser is bound to make and abide by such examination. Salt in bags is not susceptible of inspection and examination without much trouble and inconvenience. *Ib.*

8. The vendor is bound, in case of eviction, to refund to the purchaser the whole amount of fruits and revenues which the latter has been condemned to pay to the true owner. *Downes* v. *Scott*, 278.

9. Where the purchaser was aware, at the time of the sale, that the thing sold belonged to another, article 2427, by implication, refuses him damages in cases of eviction but it does not effect his right to recover the price. The right exists though the purchaser was aware that the thing sold belonged to another, unless excluded by express stipulation, or unless the purchaser bought expressly at his own risk and peril. C. C. 1960, 2481. *Hall* v. *Nevill*, 326.

10. Where a quantity of pork in hogsheads is sold, without any express stipulation or exclusion of warranty, and the purchaser, after examining some of the hogsheads, on the assurance of the broker employed to make the sale that every piece had been examined by an experienced and skillful agent and found to be sound, makes no further inspection, the vendor will be bound by an implied warranty as to the quality. C. C. 2497. And though an implied warranty may not extend to apparent defects, this exception cannot be extended to a case in which a representation was made calculated to quiet the vigilance of the purchaser, with regard to merchandize the inspection of which would be attended with inconvenience. *Huntington* v. *Lowe*, 377.

11. Where a purchaser of a quantity of pork in hogsheads discovers, after the purchase, that a part of it is unsound, he may retain the sound hogsheads, and return the unsound. The rule that the redhibitory vice of one of several things sold together gives rise to the redhibition of all, does not apply to such a case. *Ib.*

12. Where a purchaser does not obtain such an article as he had a right to suppose that he was buying, and the inferiority is of a latent character, though there be no fraud on the part of the vendor, the purchaser will be entitled to indemity to the full extent of the difference between the value, at the time of the sale, of such an article as he had a right to suppose he was buying, and the value of such an article as he got. *Slaughter* v. *McRae*, 455.

13. The Code having provided (articles 3523, 3524) that, where the seller knows of the vice of the things sold and omits to declare it, an action of redhibition may be commened at any time, provided a year have not elapsed since the discovery of the vice, and that the discovery is not to be presumed but must be proved by the seller, an

allegation by a plaintiff in a redhibitory action instituted on the 30th March, that the slave ranaway from him on the 16th of March of the preceding year, will not relieve the defendant from the necessity of proving the time of the discovery of the vice. The fact that the slave ranaway on the day mentioned in the petition, does not necessarily involve the knowledge of the pre-existence of the vice, which forms the basis of the action. C. C. 2505. *Stewart* v. *Sowles*, 464.

14. In an action against a vendor to rescind the sale of a slave on account of the vice of running away, and for damages, though it be proved that the defendant knew of the redhibitory vice and omitted to declare it, plaintiff can only recover such damages as would, at the time of defendants' refusal to restore the price, have indemnified him, that is the price with interest, the expense of advertizing the elopement and the costs of the act of sale; he cannot recover fees paid to counsel for instituting the redhibitory action. The expenditure of fees of counsel was the result of the refusal to restore the price. It was not such an immediate and direct consequence of the breach of the contract, as is contemplated by articles 2525, 1928 of the Code. *Ib.*

15. Where the plaintiff in an action to rescind the sale of a slave on account of a redhibitory disease, and for damages for expenses incurred, presents a supplemental petition alleging that, since the commencement of the suit, he had sold the slave for a certain sum which was his full value, and reducing the claim for damages to that extent, the character of the action is not thereby changed; but, by disposing of the slave, defendant placed it beyond his power to comply with the only judgment which could have been rendered in his favor—for the return of the slave, on the reimbursement of the price with damages. *Peterson* v. *Burn*, 655.

16. Where a judgment has been rendered against a plaintiff in a redhibitory action, he cannot institute an action *quanti minoris* for the same cause. Nor can a plaintiff in a redhibitory action, who, by disposing of the slave affected with the redhibitory vice, has placed it beyond his power to comply with a judgment in his favor, change the action, by a supplemental petition, to one *quanti minoris*. *Ib.*

17. Damages for injuries sustained by a purchaser in consequence of redhibitory defects in the thing sold, can be recovered only in a redhibitory action, or an action *quanti minoris*. *Ib.*

18. A purchaser who has paid the price cannot demand a restitution of the price nor security even during the pendency of an action to evict; *a fortiori*, he cannot do either before he is disturbed by the true owner. The right of a purchaser to have a sale rescinded under article 2427, must be limited to those cases in which the price has not been paid. *Bonnabel* v. *First Municipality*, 699.

III. *Obligations of Purchaser.*

19. To suspend the payment of the price, a purchaser must allege and prove that he has been disquieted in his possession, or has just reason to fear that he will be disquieted. C. C. 2535. *Snow* v. *Trotter*, 268.

20. Payment of the price cannot be resisted on the ground that, the vendor has not complied with his agreement to survey and point out the boundaries of the land, where he has not been put in default for his failure to do so. *Ib.*

21. Where the purchaser was aware, before the sale, of the existence and object of a suit in which a third person set up title to the property sold, he cannot suspend payment of the price, nor require security against the danger of eviction. C. C. 2535. *Bemiss* v. *Dwight*, 337.

IV. *Sale Per Aversionem.*

22. A sale of a tract of land, which is described by its name as containing a certain number of acres, is not a sale *per aversionem*, the property not being designated by adjoining tracts nor sold from boundary to boundary. *Hall* v. *Nevill*, 326.

V. *Pact de Réméré.*

23. There can be no *vente à réméré* without a stipulation for the return of the price. A contract of sale, the validity of which is made to depend on the payment of notes which form no part of its consideration, is not a *vente à réméré*. *Downes* v. *Scott*, 278.

24. The purchaser of slaves under a *vente à réméré* does not become the owner of the children born of the slaves purchased during his possession under the contract; the vendor, when he exercises his right of redemption, is entitled to reclaim them as owner. So on the resolution of a sale of slaves, at the suit of the vendor, he is entitled to take back the offspring born since the sale. *Boner* v. *Mahle*, 600.

VI. *Recision for Lesion.*

25. The action of recision for lesion beyond a moiety is personal to the original vendee, and cannot be maintained against a subsequent purchaser in good faith. Art. 1871 of our Code is substantially the same as art. 1681 of the Code Napoléon, from which our law on the subject of lesion beyond moiety was taken, with the exception

that the provision in relation to third persons has been entirely omitted. *Snoddy* v. *Brashear*, 569.

VII. *Simulation.*

26. It is only in case of a simulated sale, not intended to convey any property, that a creditor can disregard the title of a purchaser, and commence by a seizure. In other cases, the sale must be attacked by a direct action. *Oglesby* v. *Drake*, 640.

See PLEADING, 14. PRESCRIPTION, 8.

VIII. *Judicial Sales.*

27. The description of the property offered for sale, contained in the advertizement of a probate sale, is binding both upon the vendor and purchaser, and neither can insist on any thing said by the auctioneer at the time of sale which in any way varies from, or adds to, the printed conditions or description of the object offered for sale. No error, caused by representations of the auctioneer at variance with the printed advertizement, will vitiate the sale. *Layton* v. *Hennen*, 1.

28. Where one to whom property had been adjudicated at a judicial sale, fails to pay the price at the time required, according to a fair construction of art. 2589 of the Civil Code the second sale need not be advertized during more than ten days, provided that the customary notice be given within that time. The term of ten days fixed by the Code refers exclusively to the duration of the advertizement, and not to the period at which it is to commence; and in such a case the fact that the advertizements were published during a longer period than ten days, cannot affect the validity of the sale, the law meaning ten days or more. *Duncan* v. *Armant*, 84.

29. Where a tract of land is inventoried and appraised in the mortuary proceedings as having a certain depth, and it is subsequently adjudicated to one of the appraisers, without any mention of its depth in the *procès verbal* of adjudication, the omission cannot be taken advantage of to extend the title beyond the limit assigned to it in the *mortuaria*. The legal presumption is that the officers entrusted with the sale did their duty, and sold according to the inventory and appraisement. In such a case parties claiming under the original purchaser by whom the tract was appraised, will be estopped from claiming any greater depth than he appraised. *Pontalba* v. *Copland*, 86.

30. The nullity of a probate sale of the property of a succession, resulting from the non-existence of any order therefor in the records of the parish where it was made, is one of which the heirs alone can avail themselves. *Blanchard* v. *Maureau*, 128.

31. A sale made by a sheriff, under an agreement of parties, and on terms different from those prescribed by law for forced sales, will not be viewed as a forced sale, but as subject to the rules of ordinary sales in which the vendor is bound to express himself clearly respecting the thing to be sold, under the pain of having any obscure or ambiguous clause construed against him. *Moore* v. *Hampton*, 192.

32. A purchaser at a judicial sale is not protected in the case of a mere redhibitory vice; but where there is a deficiency in the quantity of the land sold, the purchaser at a syndic's sale is entitled to a proportional diminution of the price. C. C. 2598, 2599. His rights are not as broad as those of an ordinary vendee, who may have the entire contract rescinded in case of partial eviction, where the part from which he is evicted is of such consequence relatively to the whole that he would not have purchased without the part from which he has been evicted. C. C. 2487. *Hall* v. *Nevill*, 326.

33. Where a purchaser at a judicial sale of property sold under a mortgage retained by the plaintiff on a sale of the property to the defendant, takes a rule on the plaintiff to show cause why the sale should not be rescinded, on the ground of the existence of a lease made by the defendant and not made known at the time of the sale, the defendant, not having been a party to the judicial sale, need not be made a party to the rule. *Michoud* v. *Dejoux*, 479.

34. A judicial adjudication of community property made to the surviving husband, under proceedings before a court of competent jurisdiction, in which the minor heirs were represented by their under tutor, will not be annulled for informalities anterior to the decree of adjudication. The minors being represented by their under tutor, the judgment of adjudication is conclusive as to the facts on which it rests, until corrected on appeal, or annulled in a direct action. *Orr* v. *Thomas*, 582.

35. A sale made of property seized under a *fi. fa.*, pending an opposition by a third person, if the opposition be sustained, will be null. *Ludeling* v. *Graves*, 597.

36. Where on an appeal from a judgment dismissing an application to homologate a judicial sale under the statute of 10 March, 1834, the record, though certified as containing all the evidence offered below, is silent as to the publication of the monition, the judgment of dismissal must be affirmed. *Monition of Johnson*, 656.

37. One who shows no interest cannot oppose the homologation of a judicial sale,

applied for under the statute of 10 March, 1834. *Ib.*

See EXECUTION OF JUDGMENT. 1, 2, 8, 9, 10, 11, 12, 13, 15. PRESCRIPTION, 15. SUCCESSIONS, VI.

SEQUESTRATION.

1. Service of a writ of sequestration on a sunday is in conflict with art. 207 of the Code of Practice; and where the evidence shows that it could have been served on any other day as well, it will be set aside. *Foy* v. *Harper*, 275.

2. It is not essential to the validity of a sequestration bond, that it should be executed before the clerk of the court in which the action is pending, or any other public officer. *Foxworth* v. *Burckhalter*, 365.

3. Where the surety in a sequestration bond removes beyond the jurisdiction of the court, the execution of another bond with a surety residing within its jurisdiction, will be sufficient. C. C. 3012. *Ib.*

4. The surety on a bond given for the release of sequestered property cannot be proceeded against by a rule to show cause. He is not a party to the original action; and the right of proceeding summarily, expressly granted by law against sureties on bonds given in cases of arrest, attachment, or appeal, has not been extended to sequestrations. Stat. 20 March, 1839, s. 2, 3, 30. *Baker* v. *Doane*, 434.

5. A judgment, rendered in an action in which a sequestration was obtained by the plaintiff, determining the ownership of the property sequestered to be in the defendant, is conclusive against the sureties on the sequestration bond as to the question of ownership. In an action on their bond, no evidence can be offered by them to impeach the ownership of the party in whose favor the decision was rendered. *Jones* v. *Doles*, 588.

6. In an action against the sureties in a sequestration bond for damages for the illegality of the sequestration, the plaintiff must show the value of the property sequestered, and such other injury as he may have sustained. In the assessment of damages, fees of counsel employed to defend the original suit may be included; nor is it material to show that such fees have been actually paid; it is enough that plaintiff has incurred a liability for them. Where defendants contend that the property sequestered has been restored since the judgment on the sequestration suit, they must show that fact, or that the plaintiff has otherwise gained possession of it. *Ib.*

7. Whatever may be the responsibility of the sheriff for the loss of property sequestered, the plaintiff, and the sureties on his sequestration bond, will, in case the sequestration be adjudged illegal, be responsible for its restoration. *Ib.*

SERVITUDE.

1. Though an adjoining tract of land be subject to the servitude of receiving the waters running naturally from the estate above, the proprietor of the latter is not entitled to enter at pleasure on the contiguous tract, without the consent of its owner, whenever it may be necessary to remove any obstructions to the enjoyment of the servitude; nor can he widen the drain by which the waters are carried off; such an improvement, if necessrry, can alone be made by the police jury, on making adequate compensation to the owner of the land subject to the usufruct, for the damage he may sustain thereby. The party entitled to the servitude must call upon the owner of the land which is subject to it to remove such obstructions, and may compel him by legal means to do so. Arts. 768, 770 of the Civil Code relate exclusively to conventional servitudes; natural servitudes are subject to different rules. *Landry* v. *McCall*, 134.

2. Two contiguous city lots, belonging to the same proprietor, were purchased by different persons at a judicial sale. On one of them there was a brick building, the foundation of one of whose walls projected under the surface of the other lot, though the wall itself did not extend over any part of it. The purchaser of the latter having made use of this wall in the erection of a building: *Held*, that the owner of the first lot was entitled to recover of him one-half of the value of the wall, and one-half of the value of the ground upon which it was built; and that the projection of the foundation by the original owner, does not impair the rig t of the purchaser to indemnity for the use made of his land and wall. *Murrell* v. *Fowler*, 680.

3. The fact that the owner of a lot had already built a wooden house on it, leaving a space for a passage between the house and the division line, will not deprive the owner of a contiguous lot of the right given by article 671 of the Code, to the owner who first builds in a city, town, or their suburbs, in a place which is not surrounded by walls, of resting one half of his walls on the land of his neighbor, provided he builds with stone or brick at least as high as the first story, and provided the whole thickness of the wall do not exceed eighteen inches, not including the plastering, which must not be more than three inches. Article 671 establishes a servitude with which urban pro-

perty is encumbered without reference to title or the agreement of parties. C. C. 662, 670. *Carrigan* v. *De Neufbourg*, 440.

4. Where an act of sale of a tract of unimproved land, made at a time when the cultivation of sugar was unknown in that part of the State where the land was situated, established a servitude in favor of the land sold on an adjoing tract, authorizing the purchaser "*a prendre du bois pour l'utilité de son habitation sur &c., ce privilége restant attaché pour toujours à la dite terre*", the purchaser will not be allowed, on subsequently commencing the cultivation and manufacture of sugar, to take from the land subject to the usufruct wood to make his sugar. *Per Curiam:* The provision of the quantity of wood necessary for the manufacture of sugar could not have been contemplated by the parties, at the time; and were we to authorize the taking of that quantity, what was originally agreed to as an ordinary servitude, might destroy the value of the burthened estate. *Delahoussaye* v. *Landry*, 549.

5. Wherever a tract of land is entirely surrounded by other estates, whether they belong to one or more proprietors, and there is no way from it to a public road, the law gives the owner an absolute right to a servitude of way, which must be generally taken on the side nearest to the public road (C. C. 696, 697); and this rule should only be departed from for weighty considerations. But the most direct course may be deviated from in the construction of the road, with a view to render the servitude less onerous to the land over which it is laid out; and the proprietor of the land over which it passes is entitled to indemnity for the injury sustained by him from its construction. *Miller* v. *Thompson*, 567.

SHERIFF.

1. A sheriff will not be personally responsible, where he acts under the orders of a court having jurisdiction in the matter. *Gates* v. *Bell*, 62.

2. A sheriff ordered by the court to release sequestered property on the execution of a bond by defendant with a certain person as surety, released the property on the execution of a bond by an agent of the person designated as surety in the name of the latter, but who having no express authority to bind his principal in such a contract, could not bind him as surety. *Held*, that though plaintiff's judgment against his debtor is *primâ facie* evidence of the extent of injury in consequence of the sheriff's failure to take the surety ordered, yet that, having acted in good faith, he will be responsible for such damages only as the plaintiff is proved to have sustained by reason of the bond not being obligatory on the party by whom it was to have been signed as surety; and where he is shown to have been insolvent at the date of the judgment against the principal, nothing can be recovered against the sheriff. *Ib.*

3. Where a sheriff, by whom a plantation had been seized under writs in his hands, is, by consent of all concerned, made the factor of the estate, and in that capacity ships the crop, receives the proceeds, makes disbursements, and has the general supervision and control of the property, the allowance of an item in his account of two and a half per cent commissions on the amount of cash which came into his hands for receiving and disbursing, is not in conflict with article 71 of the constitution. *Drew* v. *Chambliss*, 246.

4. A sheriff by whom a plantation and slaves had been seized and taken possession of, who has paid himself out of the funds in his hands for all disbursements made by him for the safe-keeping and preservation of the property, can make no additional charge for his responsibility and general care; for this he is remunerated by the emoluments of his office. *Per Curiam:* Sheriffs are bound to take care of property taken possession of by them, and are authorized to lay out money for its preservation. They may appoint guardians for its safe custody, and the law gives them ample authority for all proper expenditures, and the constitution imposes no obstacle to their reimbursement; but article 71 prohibits such allowances as that claimed in this case. *Farrar* v. *Rowley*, 276.

5. The emission of a person elected to the office of sheriff to give bond within twenty days from the date of his commission, as required by the statute of 20 April, 1847, does not, *ipso facto*, operate a forfeiture of the office. If a bond be subsequently executed, he will be thereafter competent to execute process. *Mechanics' Bank* v. *Labiche*, 539.

6. The omission by a sheriff to give a bond as collector of taxes, does not, *per se*, affect his capacity as to the execution of judicial process. *Ib.*

7. In a proceeding, by motion, against a sheriff, under section 17 of the statute of 7 April, 1826, to render him liable in the amount for which a *fi. fa.* was issued, on account of his failure to return the writ within the legal delay, evidence is inadmissible to show that the defendant in execution owned property, while the writ was in the hands of the sheriff, which the latter neglected to seize. Such evidence is inadmissible, though the existence of the property be averred in the motion; but it would

be proper in an action for damages. *Lay* v. *Boyce*, 622.

8. The statute of 7 April, 1826, s. 17, does not impose upon a sheriff the payment of the amount for which a *fi. fa.* was issued, as a penalty for his mere failure to make a return within the legal delay; and when proceeded against under that statute he may show any circumstance which would excuse a failure to execute or return the writ. Proof that he notified the plaintiff of his inability to find any property, and of the defendant's refusal to give up any when demanded, is a sufficient excuse, the plaintiff being thereby as fully notified of the officer's inability to execute the writ, as he would have been by a return to that effect made on the writ within the legal delay. The object of the statute is not to punish the officer, but to afford a prompt remedy to the creditor for any injury he may sustain. *Ib.*

9. Where in a proceeding against a sheriff under section 17 of the statute of 7 April, 1826, for failing to return a *fi. fa.* within the legal delay, the writ and the return thereon are offered in evidence by the plaintiff, and there is no averment that the statements in the return are incorrect, they will be considered as true. *Ib.*

See ATTACHMENT, 13.

SHIPPING.

1. The owners of a steamer are bound to pay for supplies furnished to their agents for the use of the boat, and proved to have inured to their benefit. *Bent* v. *Lauve*, 88.

2. By the mercantile law, part owners of a vessel are liable *in solido* for repairs, and necessary expenses for its use. *Ib.*

3. A ship-owner cannot be made liable for any contract or expenditure made by the captain in a foreign port, unless for some object necessary under a fair view of his interests. *Barker* v. *York*, 90.

4. Where, on an attempt by one representing himself as an agent for a ship owner and by the consul of the nation to which the vessel belongs, to remove a master from the command of his vessel, the latter employs counsel to maintain his right to the command, the owner, if his interests are shown to have been in conflict with the course pursued by the master, cannot be made liable for the fees of counsel employed by him. *Per Curiam:* Where counsel sue for fees for professional services, their claim must rest upon the conscientious and exclusive application of those services to the business and interests of those who are called upon to pay them. *Ib.*

5. The master of a steamer, which had sunk with its cargo, may, in the absence of the owner of the cargo, employ persons to recover the submerged property; and in the absence of any agreement on the subject, the law will imply a promise to pay a reasonable compensation for its recovery. In estimating the compensation, the skill and science employed, and the exposure and peril to which the operation exposed the parties, should be taken into consideration. *Cheevy* v. *Cummings*, 163.

6. Where a bill of lading is executed for certain cases of *domestics*, with particular marks and numbers, the words "*contents unknown*" being written above the signature to the bill of lading, and one of the cases is not delivered, the shipper, on proving that the lost case contained silk goods and not domestics, may recover the value of its contents from the owners of the vessel, where the misdescription was not intended to impose on the carrier, and it is not pretended that a higher freight would be charged had its contents been known, nor that a knowledge of the real contents of the case would have induced greater watchfulness on the part of the carrier. It would be otherwise, had the misdescription injuriously affected the rights of the carrier; in such a case, the consequences should fall upon the party making it, though innocently. *Fassett* v. *Ruark*, 694.

7. The contract of the owners of a vessel employed in carrying freight is, to deliver goods to the consignee, and the responsibility continues until there is an actual delivery, or something equivalent to, or a substitue for, it. Even assuming the general rule to be that, putting the goods on the wharf discharges the vessel where there has been a notice to the consignee of the time and place of the delivery, it cannot be construed with such rigor against the consignee as to put the goods unqualifiedly at his risk from the very instant of landing them, where he has made repeated calls for them during the day, and they were not put on the wharf until an advanced hour of the day, and no care or attention was afterwards given to the property by the officers or crew of vessel. Io such a case, if the goods be lost, the owners of the vessel will be answerable for their value, with interest from the time of the loss. *Segura* v. *Reed*, 695.

See EVIDENCE, 16, 37. PRIVILEGE, 1, 2, 3.

SLAVE.

1. Parol evidence is admissible to prove an agreement with a slave to emancipate her, and the execution by the latter of her part of the contract. Article 1783 of the Civil Code, which authorizes slaves to contrcta

on their account for their emancipation, subjects those contracts to no particular formality. The rule contained in that article is derived from the laws of Spain, into which it had been introduced from the civil law, and must be interpreted with us as it has uniformly been under those systems of jurisprudence. *Per Curiam:* The act of emancipation must be in writing and authentic; but this regulation of public order has nothing to do with the contract under which the right to be emancipated is acquired by a slave. *Gaudet* v. *Gourdain*, 136.

2. A child born of a woman after she has acquired the right of being free at a future time, follows the condition of its mother, becoming free at the time fixed for enfranchisement. C. C. 196. *Ib.*

3. A slave who absconds from his master steals himself, and stands as other stolen things, and neither possession nor title can be acquired to him. *Oates* v. *Caffin*, 339.

4. The laws of this State on the subject of slaves, whether in the Civil Code or the Code of Practice, or in the ordinary statutes, being on the same subject, must be construed together, and in such a manner as to give effect to all. *Ib.*

5. A *statuliber* may sue for his liberty, unaided by a curator or other person. The appointment of a curator to a *statuliber*, is only necessary to preserve or administer property given or devised to him after he has acquired the right to freedom at a future time. C. C. 193. *Ex parte Louis*, 467.

See Criminal Law, I. II. 29. Evidence, 3, 6, 51. Hypothecary Action, 1. Mortgage, 3. Obligations, 19. Petitory Action, 4. Possessory Action. Sale, 2, 13 to 16, 24.

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SUBROGATION.

See PAYMENT, 1, 4, 7 to 10. SURETY, 4.

SUBSTITUION.

See DONATIONS, 11, 13.

SUCCESSIONS.

See COURTS, 2.

I. *Jurisdiction of Successions.*

1. The court of the parish in which the deceased had his domicil at the time of his death, has exclusive jurisdiction of his succession. The appointment of an administration by a court in another parish is a nullity. *Succession of Williamson*, 261.

II. *Evidence in Probate proceedings.*

2. In all probate proceedings the testimony of witnesses must be taken in writing. The reorginization of the judiciary under the constitution of 1845 has made no change in the rule, prescribed by article 1042 of the Code of Practice, on this subject. A non-compliance with the article may be taken advantage of by assignment of error on appeal. *Succession of Reeves*, 554.

III. *Claims against Successions.*

3. The claim of a creditor of a succession, established by a judgment obtained against the executors, after a *contestatio litis*, cannot be afterwards examined at the suit of the heirs, but must be classed as a liquidated debt of the succession. C. P. 986, 987. *Succession of D'Aunoy*, 36.

4. The owner of a note due by a solvent succession is entitled to legal interest from the death of the debtor, though there was no stipulation in the note for the payment of interest. C. P. 989. *Succession of Harrell*, 323.

5. A judgment against an administrator in another State is not such evidence as will authorize a judgment against the succession here. The debt must be proved by the usual evidence. *Per Curiam:* In contemplation of law there is no privity between the foreign administrator and curator here, at least in a case where the sole property here is real estate, and as such wholly subject to the jurisdiction of this State. *Sargent* v. *Davis*, 353.

6. Services rendered by counsel, necessary for the settlement and partition of a succession, enuring to the benefit of all the parties in interest, must be borne by the succession. *Succession of Whitehead*, 396.

7. The presenting of a claim to the representative of a succession is in the nature of an amicable demand, and is governed by the same rules. *Dubuch* v. *Wildermuth*, 407.

8. Where a claim against a succession is liquidated, the creditor is not required to institute an action in the ordinary form against the succession to enforce payment; he may proceed summarily by rule. C. P. 991, 992. *Ib.*

IV. *Attorney of Absent Heirs.*

9. There must be proof of the existence of absent heirs, to authorize the appointment of an attorney to represent them. In the absence of such proof the appointment will be revoked as illegal. *Lucey* v. *Newport*, 226.

V. *Administrators and Curators.*

10. An heir, present or represented, is entitled to the administration of a succession in preference to the surviving husband or wife. C. C. 1114. *Succession of Williamson*, 261.

11. Where a curator of a vacant succession fails to comply with a judgment ordering him to pay into the treasury of the State a balance remaining in his hands, he will be liable, in an action against him by the heirs, for interest on the balance from the day on which it should have been paid into the treasury. *Sargent* v. *Davis*, 353.

12. An administrator will not be liable personally for the costs of a probate sale made at his instance to effect a partition, though subsequently set aside for informalities, where the proceedings to effect it were conducted by counsel, contradictorily with the heirs, and the sale was made under a decree of court. Having proceeded in good faith, and used the precautions which prudence suggested, the error cannot be imputed to negligence, nor render him personally answerable. *Succession of Whitehead*, 396.

13. Where an administrator, in the exercise of a sound discretion, deems it necessary for the security of the property under his administration that it should be insured, it is his duty to insure it, and the costs must be borne by the succession. *Ib.*

14. Though an administratrix was authorized to employ counsel, and the amount allowed by the judge, in homologating a provisional tableau of distribution, appears to be just, the services having been necessary for the settlement of the succession, and rendered for the general benefit of the creditors who are bound to remunerate the attorney, yet where no contract is shown for a fee, and no sum appears to have been paid to the attorney, and the claim is presented in the shape of an allowance, courts will be prohibited from making it, by article 71 of the Constitution. *Succession of Holbert*, 436.

15. Where a succession, which owes no debts, consists of property susceptible of immediate division, and all the heirs are present, and one of the heirs of age and the tutrix of the minor heirs oppose the appointment of any administrator, insisting on an immediate partition, and the appointment of an administrator will only produce unnecessary expense and delay, no such appointment should be made. Article 1040 of the Civil Code, which provides that where there are several heirs, some of whom have accepted unconditionally and others who claim the benefit of the term for deliberating, an inventory shall be made, and an administrator appointed to manage the effects of the succession until a partition be made among the heirs, must be considered as modified by article 976 of the Code of Practice, which requires the appointment of an administrator only in case some of the creditors require it. *Per Curiam:* Even in case there are no debts, we do not undertake to say that an administrator cannot be appointed. There may be cases in which such an appointment would be advantageous, nay necessary, to the interests of a succession; and the propriety of subjecting the succession to such a charge, must rest with the discretion of the judge, on the facts before him. *Succession of Story*, 502.

16. Where two persons qualify as joint administrators of a succession, and there is no severance of their duties, they will be responsible, *in solido*, for the proceeds of the sale of the effects of the succession which have come into their hands. In such a case the administrator who seeks to relieve himself from responsibility for a dilapidation of the funds received, must show that it was occasioned by no neglect of duty on his part. There is no reason why the rule of responsibility *in solido*, established by article 1674, in case of a joint administration by executors, should be confined exclusively to that class of administrators. *St. André* v. *Rachal*, 574.

17. Interest is due on any balance found to be owing by an administration to a succession, from the date of the judgment establishing the debt. The amount must be considered as due *ex contractu*. *Ib.*

18. An administrator has no authority to make admissions as to the value of the hire of slaves, the amount of which is claimed from the succession in his hands. *Orr* v. *Thomas*, 582.

19. Where a succession is solvent, and the whole property of which it is composed is under the care of the administrator, he is authorized to make any necessary advances for the support of the surviving widow in community and of the minor heirs; but such advances must be charged to the widow and the minor heirs, who, on a partition of the succession, will be considered as having received the amount so advanced on account of their shares, and the administrator will be entitled to credits accordingly. *Succession of Broadaway*, 591.

20. The only charge to which a succession can be subjected for its complete administration is two and a half per cent on the amount of the inventory, after deducting therefrom bad debts. C. C. 1062, 1187, 1188, 1676. *Succession of Day*, 624.

21. A curator of a succession, who relinquishes his trust without having completed the administration, but after selling all the property of the succession, can claim commissions only on the amount he has re-

ceived, and on debts which he has made diligent, though unavailing, efforts to collect, but which he has placed in a condition no longer to require the agency of his successor, by ascertaining them to be desperate or otherwise. *Ib.*

22. The release of the sureties of an administratrix authorizes the heirs or creditors to compel her to give new security, but does not deprive her of the right to collect the debts of the succession, until removed from office. *Norris* v. *Fristoe*, 646.

See EVIDENCE, 24, 28. OBLIGATIONS, 2.

VI. *Sale of Effects.*

23. Where a purchaser of property sold at a succession sale refuses to take it and pay the price, no new order of court is necessary to authorize the executor to resell it *à sa folle enchére. Per Curiam:* The authority to sell having been once obtained, it was his duty to complete the sale, the coercive measures established by law for enforcing payment of the price being left to his discretion. *Duncan* v. *Armant*, 84.

24. Where the conditions announced at a sale of land, and stated in the *procès-verbal*, show clearly that it was intended that the property should remain mortgaged to secure payment of the notes given for the price, the effect of an adjudication, made upon those conditions, will be at once to convey title and create a mortgage. It was not necessary to the perfection of the title that the adjudication should have been followed by a separate act, signed by the parties (C. C. 2601); and the *procès-verbal* of a sale, made under the authority of the Court of Probates, is full evidence of the mortgage retained, and when signed by the purchaser and parish judge, in the presence of two witnesses, imports a confession of judgment. Neither the signature of the administrator of the succession, nor of any agent for him, is necessary to complete the purchaser's title, nor to give to the *procès-verbal* the authenticity required to authorize an order of seizure and sale. *Brooks* v. *Walker*, 150.

25. The purchaser of the property of a succession cannot plead in compensation a debt due to him by the deceased. An administrator cannot assent to such an extinguishment of the debt, in violation of the rights of other creditors. *Ib.*

26. The court having jurisdiction in the matter of a succession may order so much of the property to be sold, at the instance of a debtor, as may be necessary to satisfy his demand. Such an order may be applied for by rule; it is not necessary that the proceeding should be by petition. *Dubuch* v. *Wildermuth*, 407.

See MANDATE, 4.

VII. *Tableau of Distribution.*

27. An opposition to a tableau of distribution of the effects of a succession, presented after the decree for its homologation had been rendered, is too late. The fact that the opposition was presented a few moments after the decree was rendered, does not change the case. *Succession of Macarty*, 383.

28. The law fixes a period within which an opposition to a *tableau* of distribution of the effects of a succession must be made; it can only be made afterwards, where the proceedings have been suspended. But when judgment of homologation has been pronounced, creditors who deem themselves injured by it can only be relieved by a new trial; and this cannot be allowed, where the opposition has not been filed until judgment of homologation had been pronounced. *Ib.*

29. A decree for distribution among the heirs of the proceeds of a succession, will not be binding upon them without citation, nor will they be bound, without citation, by an allowance of commissions to the executor made in a tableau of distribution. *Ib.*

30. The liability of a surviving wife for the debts of the succession of her husband resulting from acts of improper intermeddling, cannot be enforced by an opposition to a tableau of distribution presented by her as his administratrix; it must be established in a separate action. In presenting a tableau she acts in her representative capacity, and in the litigation which may arise upon it, she can only be held to a strict accountability for the property confided to her administration. *Succession of Mouton*, 561.

See CESSIO BONORUM, 10.

SUMMARY PROCEEDINGS.

1. The right to proceed by rule implies the pendency of a suit between the parties, and is confined to incidental matters which arise in the progress of the contestation, except in certain cases in which a summary proceeding is expressly allowed by law. *Copley* v. *Conine*, 206. *Baker* v. *Doane*, 434.

2. The right to resort to summary proceedings cannot be extended beyond those cases in which it is expressly authorized by law. C. P. 98, 170, 754, 756. *Baker* v. *Doane*, 434.

See SEQUESTRATION, 4. SUCCESSIONS, 8, 26.

SURETY.

1. Wherever security is given under an

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order of court, it is what is termed by the Civil Code *judicial* security. *Whitehead* v. *Woolfolk*, 42.

2. The domicil of judicial sureties is required by law to be within the jurisdiction of the court in which the suretyship is undertaken; and such sureties, though their domicils be beyond the jurisdiction of the court, by entering into such a contract render themselves amenable to its jurisdiction. *Ib.*

3. There are no presumptions against sureties; they can only be held to the precise terms of their obligation. C. C. 3008. *Freeland* v. *Briscoe*, 255.

4. A surety will be discharged where he cannot, upon payment, be subrogated to the rights of the creditor. C. C. 3021, 3022. *Ib.*

5. Suretyship is a contract which carries with it lesion, by its very nature. *State Bank* v. *Navigation Co.*, 294.

6. Where the directors of a bank, in consequence of a private loss sustained by their cashier, make him a payment of his salary for six months in advance; and he afterwards pays himself a second time, by monthly instalments for the same period, the surety on his official bond, who had bound himself for the faithful performance of his duties by the cashier, and to save the bank harmless from any negligence or misconduct of his, and that the latter should render a faithful account of all monies and effects committed to his charge, will be bound for the deficiency. Such an advance of salary cannot release the surety. *Menard* v. *Davidson*, 480.

7. Where a surety compromises with the creditors, and settles the debt on payment of a part, he cannot recover from his principal the whole amount of the debt. A surety is not permitted to speculate on his principal. The gain on a compromise made by him inures to the benefit of the principal. *Pickett* v. *Bates*, 627.

8. Where a surety has extinguished the claim of the creditor by a compromise, he must establish the terms of the arrangement to entitle him to recover against the principal. *Ib.*

9. Sureties are entitled to relief for partial payment made by them. The obligation of the principal towards a surety is not indivisible. *Ib.*

10. Defendant bound himself as surety on a bond in favor of a bank, which recites that: "Whereas J. D. has been appointed note clerk, to continue in office during the will of the present, or any future board of directors of the said bank: now the condition of this obligation is, that if the said J. D. shall well, truly, and faithfully do and perform the duties of said office of note clerk, shall render a faithful account of all monies and effects committed to his charge or under his control, and generally shall save the said bank harmless on account of any negligence or misconduct of him, the said J. D., then this obligation to be void, else to remain in full force." The directors of the bank were elected annually. D. embezzled from the bank a sum exceeding the amount of the bond, but no part of it was taken until more than twelve months after his appointment. In an action against the surety on a bond: *Held*, that the office was not an annual one; that it does not follow because the directors are to be elected annually, that the clerks and servants of the bank hold their offices by the same tenure, they being clerks and servants of the corporation and not of the directors who appoint them; that the bond itself shows that the surety contemplated the continuance of D. in office beyond the year; and that the fact of the defalcation occurring more than twelve months after the appointment, cannot discharge the surety. Nor will he be discharged by the mere fact of a neglect of duty on the part of the cashier of the bank, in consequence of which the clerk was enabled to embezzle funds of the bank, where there was no knowledge by the directors of such neglect, and no fraud on their part. The by-laws of the bank providing for periodical examinations of its affairs formed no part of the contract with the surety; they are merely directory to the managers of the bank. *State Bank* v *Ledoux*, 674.

11. Where the surety in a bond given for the faithful discharge of the duties of an officer of the bank, on being informed by the bank of an embezzlement committed by the officer, before paying any portion of the amount embezzled, requires the bank to arrest the principal under the stat. of 28 March, 1840, and the bank refuses to do so, the surety will not, in the absence of any indication of a fraudulent connivance at the escape of the clerk, be thereby discharged. C. C. 3030. It was the duty of the surety, if he desired to avail himself of the chances of a restoration of the amount embezzled resulting from an arrest of the principal, to have paid the amount for which he was liable, and to have exercised himself the rights of the bank. *Ib.*

12. Interest will be allowed from judicial demand on the amount found due to the plaintiffs in an action against the surety on the official bond of the officer of a bank, for an amount embezzled by the latter from the bank. *Ib.*

See APPEAL, 11, 16 to 20. BILLS OF EXCHANGE, ETC., 12, 13, 31. CORPORATIONS, 11. CRIMINAL LAW, 11, 37. EVIDENCE, 23. INJUNCTION, 5, 12. MANDATE, 2, 6. MARRIAGE, 19. PAYMENT, 1, 4, 8, 10. SEQUESTRATION, 3, 7.

TAX.

1. Art. 127 of the constitution relates to State, and not to municipal, taxes. *Lafayette* v. *Cummins*, 673.

2. The stat. of 20 April, 1846, which authorizes (s. 19) the city council of Lafayette to "lay and collect upon trades, occupations, and professions, such other taxes, not specified in this act, which, in their opinion, may be required by the wants of said city, and the imposition and collection of which may not be inconsistent with the constitution and laws of the United States or of this State," containing no prohibition of discrimination in the objects of taxation, a tax imposed by an ordinance on certain enumerated trades and professions, cannot be considered illegal or unconstitutional, because other trades and professions are not taxed, where the tax on the enumerated trades or professions is imposed on all persons exercising such trades or professions. *Ib.*

TRANSACTION.

1. Where a compromise between a debtor and creditor stipulates that the latter shall receive payment of several notes, with the interest due on them, in treasury warrants at *par*, and provides for the transfer of bank-stock and for other payments in money an alleged error in charging the debtor with interest on one of the notes from maturity only, when it was due from its date, consisting in the term from which the interest was calculated, is one of fact, and not of calculation; and where the agreement has been executed, the note given up, and the other debts paid in accordance with its terms, the creditor, who does not sue to rescind the compromise, cannot separate this item from the rest, correct the error, and leave the rest of the transaction in full force. *Robertson* v. *Wilcox*, 94.

2. B., who was a surety for A., a collector of taxes due to the United States, having executed a note, secured by mortgage, for the payment of an amount due by A. to the United States for taxes, the latter conveyed to B. all his property, of every description, authorizing him to hold or dispose of the same until the debt and incidental expenses should be paid. Some litigation having grown out of this conveyance, the parties terminated their disputes by a compromise, by which a part of the property was given back to A., and B. assumed to pay a debt due by A., and to guaranty him against any claim on the part of the United States; the rest of the property was abandoned in full ownership to B. The act of compromise recites that A. releases to B. "all rights which he had or may have generally against the United States, of whatsoever nature, consenting that B. may use them as he may see fit;" and further that B. gives to A. a full discharge for the amount paid by the former to the United States, acknowledging himself satisfied therefor, and "renouncing in favor of A. all the rights he has or may have against him in virtue of his subrogation to the rights of the United States." The heirs of B. having subsequently obtained the passage of an act of Congress by which the amount paid by him was refunded to them on the ground of its having been illegally collected from their ancestor, but not upon that of its not having been due, the heirs of A. sued them to recover the property conveyed to B., or an equivalent in money, in consequence of the heirs of the latter having recovered from the United States the amount paid by him: *Held*, that the debt due by A. to the United States was extinguished by payment, and was unaffected by the act of Congress and the payment to the heirs of B., the government having no power to revive the debt of A. without his consent; that, by the payment made by B. to the United States, A. became the debtor of B., and no longer owed the United States, B. having guarantied him against all claim on their part, and that by the compromise he was entirely discharged; that, in consequence of A.'s release from his debt to the United States, there was no failure of the consideration of the compromise; that the heirs of A. cannot be injured, nor can they profit, by the repayment made by the United States. *Thompson* v. *Chrétien*, 116.

3. A compromise may be made under the form of an onerous donation; and, in such a case, it will be subject only to the rules applicable to commutative contracts. *Delabigarre* v. *Second Municipality*, 230.

See Donations, 21. Evidence, 52. Judgment, 3.

TUTORSHIP.

1. The legal mortgage of a minor will attach to the undivided share of the tutor in the immovables of a succession as soon as he accepts it, subject to the right of priority of the creditors of the succession; and where those immovables are divided in kind, the mortgage will be restricted to his share; but where they have been sold at public auction, the mortgage will attach to the proceeds to the extent of the share of the tu-

tor. Stat. 27 March, 1843, s. 2. *Union Bank* v. *Marin*, 34.

2. Advances made by an under tutor for the use of minors, not authorized by a decree of court rendered on the advice of a family meeting, will give him no claim against the minors beyond their revenues. *Barbarin* v. *Barbarin*, 263.

3. Where a tutor has taken a suspensive appeal from a judgment which he deemed erroneous, he is without authority subsequently to acquiesce in the judgment, by voluntarily executing it, to the prejudice of the minor. A voluntary execution, under such circumstances, will not authorize the dismissal of the appeal. *Succession of Flower*, 292.

4. A sale made without the formalities prescribed by law, by a tutor, of the immovable of his pupil, is absolutely null; but may be ratified by the minor, after majority, expressly or by implication. *Vaughan* v. *Christine*, 328.

5. Where one who had caused herself to be appointed a tutrix, takes possession, by virtue of her appointment, of slaves belonging to her pupil, converts their labor to her own use, and when called upon to account denies the existence of the trust, contests the title of her pupil to the slaves, and claims as her own the fruits of their labor, she will not be allowed commissions on the amount recovered from her for the hire of the slaves, which cannot be considered, within the meaning of art. 342 of the Civil Code, as revenues accruing to the minors through her care and labor. *Ib.*

6. Where in the account rendered by a tutor in an action to compel an account, certain notes given by the purchaser of property of the minor are stated to be not yet settled, in consequence of a suit relative to the property, and they are not produced, and no evidence is offered as to their security, and no demand of payment of the notes is proved to have been made, nor suit instituted, nor other attempt to recover them, evidence will not be received to show the disturbance of title by the suit, but judgment will be rendered against the tutor for their amount. *Per Curiam:* We will not permit a tutor to plead for others, who are silent, against his pupil. *Courmes* v. *Maxent*, 335.

7. Where, on the dissolution of a particular partnership by the death of one partner, the partnership was largely indebted to a commercial firm of which the surviving partner was a member, and to whom the revenues of the property were to be paid for the reimbursement of their advances, and the survivor qualifies as tutor of the minor heir of the deceased, and continues to manage the particular partnership property as surviving partner, he will not be allowed a commission of ten per cent on the gross proceeds of the sale of the crops made by him, as commissions on the revenues of the minor under art. 342 of the Civil Code. *Per Curiam:* The defendant was administering the property of the partnership as surviving partner, and not as tutor of the minor, who, as a beneficiary heir, was only entitled to what might remain after payment of the debts. As administrator he was entitled to two-and-a-half per cent on the monies that came into his hands. *Heath* v. *Lambeth*, 362.

8. The tutrix and co-tutor of a minor, to whom a donation had been made void in form, but which was subsequently ratified by the heirs of the donor, cannot, by consenting to a restitution of its value, alienate what had become the property of the minor. *Deschapelles* v. *Labarre*, 522.

9. The prohibition to tutors to purchase the property of their wards, contained in art. 327 of the Civil Code, is not affected by any thing in the stat. of 10 March, 1834, s. 4, or that of 28 March, 1840. The stat. of 1834 relates to defects of form, and the provisions of the second do not embrace tutors. *Orr* v. *Thomas*, 582.

10. A tutor who employs, for his own advantage, slaves belonging to his pupil, or occupies land belonging to him, will be bound to the latter for any profits which might have been derived from hiring the slaves, or letting the lands, to a third person. C. C. 327, 328. *Glenn* v. *Elam*, 611.

11. Where a tutor, without authority, compromises the interest of his pupil in a promissory note, he will not be liable for the nominal amount of the portion of the note due to his pupil, but for its fair value at the date of its illegal alienation by him. C. C. 333. *Ib.*

12. Where a tutor involves the estate of his pupil in a litigation which is judicially pronounced to have been vexatious, and for which the estate is compelled to pay damages, he must be charged with the amount of the damages. *Ib.*

13. Where the amount due from a tutor has been ascertained by a judgment, interest is due on the amount from the date of the judgment. *Ib.*

14. A tutor who has neglected to invest, in the name of the minor, the excess of the revenues of the latter over his expenses whenever such excess amounts to $500, is liable for legal interrest on such excess. C. C. 341. Stat. 19 February, 1825. In adjusting the accounts of the tutor the entire revenues of the pupil, including any interest which the tutor may have become liable to pay under art. 341 and the stat. of 1825, are to be computed annually; and the ex-

cess of the revenues of the minor over his expenses, is to be considered as forming, from that date, a part of his capital in the hands of the tutor, and upon that excess, when it amounts to $500, the tutor owes legal interest, if he fail to invest it as required by law. *Ib.*

See PARENT AND CHILD.

USUFRUCT.

See DONATIONS, 11, 12. MARRIAGE, 13, 14, 15.

WARRANTY.

See SALE, II.

END OF VOLUME III.

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ERRATA.

Page 10, line 6 from top, for 1840 substitute 1846.
34 — 17 —— bottom for *individual* substitute *undivided.*
53 — 10 —— top for 29 substitute 28.
123 — 20 —— — — *were* —— *was.*
151 — 19 —— — — after *authenticity* for *of* substitute *required to authorize.*
212 — 14 —— — — for *the* State substitute *this* State.
265 — 13 —— — — *Walsh* substitute *Welsh.*
294 — 21 from bottom for *they were* substitute *it was.*
335 — 11 —— —— after *will* insert *not.*
377 — 22 from top, for 2457 substitute 2497.
436 — 22 from top, for *and* substitute *of.*
460 — 18 from bottom for 3508 substitute 3503.
462 — 12 from top, for *these* substitute *their.*
487 — 6 —— — for 760 substitute 700.
494 — 14 —— — 1589 substitute 1509.
503 — 7 from bottom, for 575 substitute 576,
504 — 2 —— ——, for *them* substitute *him.*
—— — 11 —— ——, for *Hall* substitute *Hale.*
516 — 5 —— ——, for 547 substitue 567.
529 — 22 —— ——, for 25 substitute 27.
533 — 22 from top, for *this* substitute *the.*
540 — 13 —— ——, for 1848 substitute 1847.
542 — 15 —— ——, after *Code* insert *of Practice.*
577 — 12 from bottom, for *indorsee* substitute *indorser.*
599 — 11 —— ——, for 1809 substitute 1807.
623 — 5 —— ——, for 29 substitute 20.
640 — 8 —— ——, for *rendered* substitute *recorded.*